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WILCOX & CO

No. 5478

1569

United States 1563 Circuit Court of Appeals

For the Ninth Circuit.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, a Corporation,

Appellant,

vs.

BERTHA E. LIPP,

Appellee.

Transcript of Record.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Index.

NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

McCAMANT & THOMPSON and RALPH H. KING, American Bank Building, Portland, Oregon,

For the Appellant.

H. F. McINTURFF, Chamber of Commerce Building, Portland, Oregon,

WILLIAM T. STOLL, Marshfield, Oregon, and J. W. McINTURFF, Marshfield, Oregon,

For the Appellee.

In the District Court of the United States for the District of Oregon.

BERTHA E. LIPP,

Plaintiff,

vs.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, a Corporation,

Defendant.

CITATION.

United States of America, to Bertha E. Lipp, Plaintiff:

You are hereby notified that in a certain action in the United States District Court in and for the District of Oregon wherein Bertha E. Lipp is plaintiff and The Mutual Life Insurance Company of

New York is defendant, the defendant has taken its appeal from the judgment made and entered in said cause on the 2d day of March, 1928. You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, thirty days after the date of this citation to show cause if any there be why the judgment appealed from should not be corrected and speedy justice done in that behalf.

WITNESS the Honorable JOHN H. McNARY, Judge of the United States District Court for the District of Oregon, this 19th day of March, 1928.

JOHN H. McNARY,
United States District Judge. [1*]

Due service of the within citation is admitted this 19th day of March, 1928.

W. F. McINTURFF,
Of Attorneys for Plaintiff.

[Endorsed]: Filed Mar. 19, 1928. [2]

In the District Court of the United States for the District of Oregon July Term, 1927.

BE IT REMEMBERED, That on the 8th day of September, 1927, there was duly filed in the District Court of the United States for the District of Oregon, a complaint, in words and figures as follows, to wit: [3]

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*Page-number appearing at the foot of page of original certified Transcript of Record.

In the United States District Court for the District of Oregon.

BERTHA E. LIPP,

Plaintiff,

vs.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, a Corporation,

Defendant.

COMPLAINT.

That plaintiff, for a cause of action against the defendant, alleges that:

I.

At all the times herein mentioned she was and still is a citizen and resident of the State of Oregon.

II.

At all the times herein mentioned the defendant was and still is a corporation duly created and existing under the laws of the State of New York and it thereby became and still is a citizen and resident of the State of New York.

III.

The matter and amount in controversy between the plaintiff and defendant in this action exceeds, exclusive of interest and costs, the sum or value of $3,000, viz., $4,250.00.

IV.

The plaintiff is the relict of the hereinafter mentioned John A. Lipp.

V.

On, to wit, the 3d day of March, 1913, John A. Lipp made and signed a written application to the defendant for a $3,000 policy, insuring his life, and on said date, submitted to a medical examination by a physician of the defendant's selection, and who, upon such examination, found and certified that he was in good health, and on the 30th day of March, 1913, the defendant, [4] being satisfied as to the insurability of said John A. Lipp, accepted said application and duly executed and delivered its policy to him whereby it agreed, among other things, that in consideration of the annual premium of $50.79, the receipt of which it then acknowledged, and the payment of a like amount upon each 30th day of September and March thereafter until twenty full years' premiums should have been paid, or until the prior death of said John A. Lipp, it would pay to the plaintiff as his beneficiary $3,000, upon receipt at its Home Office (New York City) of due proof of the death of said John A. Lipp, less any indebtedness thereon to the defendant, and any unpaid portion of the premium for the then current policy year; a true copy of which policy, with said application attached thereto, is attached hereto marked Exhibit "A" and made a part of this complaint. Neither the said John A. Lipp nor the plaintiff were ever paid or credited with any of the dividends owing on said policy and the plaintiff does not know the exact amount of such dividends, but she is informed and believes and therefore alleges that the same amounts to $535.00.

VI.

Said John A. Lipp and plaintiff duly and regularly paid the premiums on said policy as they became due and otherwise performed all of the terms and conditions of said policy on his or their part.

VII.

On or about January 31, 1924, said John A. Lipp died at or near Vancouver, in Clark County, Washington, at or near Portland, Multnomah County, Oregon, by drowning in the Columbia River.

VIII.

On, to wit, April 10, 1926, the plaintiff in writing requested the defendant to furnish her blank forms for making proofs of death of said John A. Lipp, and defendant on April 24, 1926, in writing, refused such request and thereby waived proofs of death and it should not now be heard to say that such proofs were not made. [5]

IX.

Thereafter on, to wit, April 26, 1926, the plaintiff made and mailed to the defendant at its address in New York City, in the State of New York, due proof of the death of said John A. Lipp, duly verified by her and by Lyle J. and Reta Lipp, the son and daughter of the plaintiff and said John A. Lipp, and demanded payment of said policy, a true copy of which is hereto annexed, marked Exhibit "B" and made a part hereof.

X.

On, to wit, June 4, 1926, the defendant in writing acknowledged receipt to the plaintiff of said proofs

of death and denied any liability to the plaintiff and refused payment of said policy upon the ground that said proofs of death were "not sufficient to satisfactorily prove the death of said John A. Lipp."

XI.

Thereafter on July 9, 1926, the plaintiff in writing made, and on July 12, 1926, mailed to the defendant at its Home Office in New York City supplemental proofs of the death of said John A. Lipp duly verified by her, a true copy of which is hereunto annexed, marked Exhibit "C" and made a part hereof.

XII.

On the 29th day of October, 1926, the defendant in writing acknowledged receipt of such supplemental proofs of death, and again denied any liability to the plaintiff and refused payment of said policy to her, stating that it had made an investigation and was satisfied that said John A. Lipp was not dead.

XIII.

The plaintiff has been required to employ attorneys to enforce payment of said policy; $1,000 is a reasonable sum to be allowed the plaintiff for that purpose.

WHEREFORE plaintiff prays judgment against the defendant, 1st: For the sum of $3,000, the face of said policy; 2d: For $535, the dividends owing on said policy, with interest on both of said sums at the rate of 6% per annum from June 3, 1926, [6] 3d.

For $1,000 attorney's fees; and 5th. For the costs of this action.

H. F. McINTURFF,
Residing at Portland, Oregon.
WM. T. STOLL and
J. W. McINTURFF,
Attorneys for Plaintiff.
Residing at Marshfield, Oregon. [7]

EXHIBIT "A."

Limited Payment Life.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK.

Number 2057529

Amount $3000.

Age 26

½ Annual Premium for 20 years

IN CONSIDERATION of the ½ annual premium of fifty and 79/100 Dollars the receipt of which is hereby acknowledged, and of the payment of a like amount upon each thirtieth day of September and March hereafter until twenty full years' premiums shall have been paid or until the prior death of the insured,

PROMISES TO PAY at the home office of the company in the City of New York upon receipt at said home office of due proof of death of John A. Lipp of near Vancouver, County of Clarke, State of Washington, herein called the insured, THREE THOUSAND DOLLARS, less any indebtedness hereon to the company and any unpaid portion of the premium for the then current policy-year, upon surrender of this policy properly receipted to his wife, Ber*tah* E. Lipp, the beneficiary with the right to the insured to change the beneficiary.

$50.79 Death of Beneficiary before insured: Change of Beneficiary.—If any beneficiary die before the insured, the interest of such beneficiary shall vest in the insured, unless otherwise provided herein.

When the interest of a beneficiary shall have vested in the insured, or when the right to change the beneficiary has been reserved, the insured, if there be no existing assignment of this policy, may, while this policy is in force, designate a new beneficiary, with or without reserving the right to change the beneficiary, by filing written notice thereof at the home office of the company accompanied by this policy for suitable endorsement hereon. Such change shall take effect upon the endorsement of the same on the policy by the company.

Premiums.—All premiums are payable in advance at said home office or to any agent of the company upon delivery, on or before date due, of a receipt signed by either the President, Vice-President, Second Vice-President, Secretary or Treasurer of the Company and counter-signed by said agent.

A grace of thirty days (or one month if greater) subject to an interest charge at the rate of five per centum per annum shall be granted for the payment of every premium after the first, during which time the insurance shall continue in force. If death occur within the period of grace, the overdue premium and the unpaid portion of the premium for the then current policy year, if any, shall be deducted from the amount payable hereunder. Except as herein provided the payment of a premium

or instalment thereof shall not maintain this policy in force beyond the date when the next premium or instalment thereof is payable. If any premium or instalment thereof be not paid before the end of the period of grace, then this policy shall immediately cease and become void, and all premiums previously paid shall be forfeited to the company except as hereinafter provided. [8]

CONDITIONS:

Residence and travel.—This policy is free from any restriction as to residence and travel.

Occupation.—This policy is free from any restriction as to military or naval service, and as to other occupations of the insured it is free from any restriction after one year from its date of issue, as set forth in the provisions of the application endorsed hereon or attached hereto.

Suicide.—The Company shall not be liable hereunder in the event of the insured's death by his own act, whether sane or insane, during the period of one year after the date of issue of this policy, as set forth in the provisions of the application endorsed hereon or attached hereto.

INCONTESTABILITY.—This policy shall be incontestable, except for non-payment of premiums, provided two years shall have elapsed from its date of issue.

This policy and the application herefor, copy of which is endorsed hereon or attached hereto, constitute the entire contract between the parties hereto. All statements made by the insured shall, in the

absence of fraud, be deemed representations and not warranties, and no such statement of the insured shall avoid or be used in defence to a claim under this policy unless contained in the written application herefor and a copy of the application is endorsed on or attached to this policy when issued.

If the age of the insured has been misstated, the amount payable hereunder shall be such as the premium paid would have purchased at the correct age.

Amount of Insurance Payable at Death.

Premiums Payable for Twenty Years or until Prior Death.

ANNUAL DIVIDENDS.

PARTICIPATION.

Annual Dividends.—This policy shall participate in the surplus of the company and the proportion of the surplus accruing hereon shall be ascertained and distributed annually on the anniversary of its date of issue. At the option of the insured or the owner of this policy such dividends shall be either,—

(1) Paid in cash; or

(2) Applied toward the payment of any premium or premiums; or

(3) Applied to the purchase of paid-up participating additions to the policy; or

(4) Left to accumulate to the credit of the policy with interest at the rate of three per centum per annum compounded annually and payable at the maturity of the policy, but with-

drawable on any anniversary of the policy (hereinafter refered to as "dividend deposits").

Unless the insured or the owner of this policy shall elect otherwise within three months after the mailing by the company of a written notice requiring the election of one of the four above options, the dividends shall be applied to the purchase of paid-up additions, as per option (3). Such paid-up additions may be surrendered at any time for a cash value which shall not be less than the original cash dividends as per option (1), provided the reserve for such paid-up additions has not been applied to purchase extended insurance or paid-up insurance in accordance with the provisions of the clause entitled "Options on Surrender or Lapse." [9]

Post-mortem Dividend.—On the death of the insured, a dividend will be credited to this policy for the fraction of a year, if any, from the due date of the last annual dividend, or from the original date of the policy if death takes place in the first policy-year, to the date of such death. Such dividend shall be payable in cash with the amount insured.

LOANS.—At any time after three full years' premiums have been paid and while this policy is in force, the company will advance on the execution of a proper loan agreement and on proper assignment and delivery of this policy and on the sole security hereof, an amount which, with interest thereon to the end of the current policy-year, shall be equal to, or at the option of the owner less than, the

cash value at the end of said year; any existing loan hereon with accrued interest, and any unpaid portion of said current policy-year's premium shall be paid out of such advance. Interest on the loan will be at the rate of six per centum per annum payable at the end of each policy-year and this interest, if not paid when due, shall be added to the existing loan and shall bear interest at the same rate. The loan with accrued interest may be repaid to the company at any time. Failure to repay any such advance or to pay interest shall not avoid this policy unless the total indebtedness hereon to the company shall equal or exceed the cash value at the time of such failure, nor until one month after notice shall have been mailed by the company to the last known address of the insured and of the assignee of record, if any, at the Home Office of the Company. (If a loan is desired before three full years' premiums have been paid, the unpaid balance of the three full years' premiums may be paid by deduction from the loan when made if the amount which can be loaned is sufficient.)

ASSIGNMENT.—No assignment of this policy shall be binding upon the company unless it be filed with the company at its said home office. The company assumes no responsibility as to the validity of any assignment.

OPTIONS ON SURRENDER OR LAPSE.—After this policy shall have been in force three full years, the owner, within three months after any

default in payment of premium but not later, may elect either,

(a) to surrender this policy for its cash value less any indebtedness to the company hereon (this balance is hereinafter referred to as the net cash value); or

(b) to have the insurance continued in force as term insurance from the date of such default, without future participation and without the right to loans or cash value, for an amount equal to the face amount of this policy and any outstanding dividend additions less any indebtedness to the company hereon; or

(c) to purchase non-participating paid-up life insurance payable at the same time and on the same conditions as this policy.

The cash value under option (a), after premiums have been paid for three full years or more, will be the reserve at the date of default for the face amount of this policy and for any dividend additions hereto, computed according to the American Experience Table of Mortality assuming interest at the rate of three per centum per annum, less a surrender charge which, in no case, shall be more than one and one-half per centum of the face amount insured by this policy; after premiums have been paid for ten full years or more there shall be no surrender charge. [10]

The term for which the insurance will be continued under option (b), or the amount of the paid-up life insurance obtainable under option (c), will be such as the net cash value obtainable under

option (a) will purchase at the attained age of the insured at the date of default when applied as a net single premium according to the American Experience Table of Mortality assuming interest at the rate of three per centum per annum.

If this policy shall not, within three months after default in payment of premium, have been surrendered to the company at its home office for its cash value as provided in option (a), or for paid-up insurance as provided in option (c), the insurance will be automatically continued as provided in option (b).

TABLE OF LOAN AND SURRENDER VALUES.

The values in the following table are computed in accordance with the above provisions and upon the assumption that premiums have been paid in full for the number of years the "Policy has been in force." If there be any indebtedness to the company on the policy, or if there be any outstanding dividend additions, the values will be modified as hereinbefore provided.

The cash and loan values and the paid-up life insurance stated in the following table apply to a policy for $1,000. As this policy is for $3,000 the cash loan or paid-up life insurance available at the end of any policy-year will be three times the amount stated in the table for that year.

The period of paid-up continued insurance remains the same for a policy of any amount.

The figures contained in this table represent the actual amounts available after deduction of the

surrender charge, if any, but without allowance for dividend additions or indebtedness.

	Column 1	Column 2	Column 3		
After policy has been in force	*Cash value **Loan value	Paid-up non-participating life insurance	Paid up non-participating continued (term) insurance for Years	Months	Days
3	$ 46.00	$120	6	0	0
4	64.08	166	8	7	0
5	87.42	222	12	0	0
6	109.00	273	15	1	0
7	133.83	329	18	5	0
8	159.44	386	21	5	0
9	185.86	442	23	11	0
10	213.12	498	26	2	0
11	238.75	548	27	9	0
12	265.28	598	29	2	0
13	292.73	648	30	5	0
14	321.16	699	31	7	0
15	350.59	749	32	8	0
16	381.06	799	33	10	0
17	412.62	849	35	2	0
18	445.33	899	36	10	0
19	479.19	949	39	2	0
20	514.30				
21	524.23				
22	534.37	POLICY FULL PAID			
23	544.70	PARTICIPATING			
24	555.22				
25 years	565.89				

3 K Age 26

[11]

Values for later years will be computed upon the above stated basis and will be furnished upon request.

*The cash value provided for in the above table for the end of a policy-year, less interest thereon at the rate of six per centum per annum to the end of such policy-year, can be obtained during such policy-year provided all premiums due prior to the end of such policy-year shall have been duly paid.

**The loan value provided for in the above table for the end of a policy-year can be obtained (less interest) during such policy-year as explained in the above clause entitled "Loans."

Any dividend deposit standing to the credit of this policy at date of surrender or lapse shall then be payable in cash in addition to payment of the cash value or to the granting of the paid-up life or term insurance above provided for.

REINSTATEMENT.—Unless it shall have been surrendered for its cash value, this policy may be reinstated at any time within three years from date of default in payment of any premium, upon evidence of insurability satisfactory to the company and upon payment of the arrears of premium with interest thereon at the rate of five per centum per annum, and, at the option of the insured, either (a) upon payment in cash to the company of any indebtedness which existed at said date of default together with interest thereon at the rate of six per centum per annum, compounded annually, or

(b) upon reinstatement of such indebtedness increased by the amount of interest thereon at the rate of six per centum per annum, compounded annually, provided such reinstated increased indebtedness does not exceed the loan value at the date to which reinstatement is made.

MODES OF SETTLEMENT.—If election be made as hereinafter provided, the net sum payable under this policy at death of the insured, provided such net sum be not less than $1,000 will be settled in one of the following methods in lieu of being then paid in one sum:

(1) By the payment of interest at the rate of three per centum per annum on said net sum, payable at the end of each year during the lifetime of the beneficiary, and by the payment upon the death of the beneficiary of the said net sum together with any accrued interest for the year then current, unless otherwise directed in the notice of election, to the beneficiary's executors, administrators or assigns.

(2) By the payment of equal annual instalments for a specified number of years, the first instalment being payable immediately, in accordance with the following table for each one thousand dollars of said net sum.

(3) By the payment (2) of twenty equal annual instalments certain, whether the beneficiary lives or dies, the first annual instalment being payable immediately, and the twentieth annual instalment being payable nineteen years later, and (b) of annual instalments of a like amount thereafter throughout the remaining lifetime of said benefici-

ary, the first of such annual instalments being payable one year after the twentieth annual instalment certain provided said beneficiary be then alive, the payments terminating with the last annual instalment preceding the death of said beneficiary, in accordance with the following table for each one thousand dollars of said net sum. [12]

Any instalments payable under (2) or (3) which shall not have been paid prior to the death of the beneficiary shall be paid, unless otherwise directed in the notice of election to the beneficiary's executors, administrators or assigns.

The above modes of settlement (1) and (3) are not available if the beneficiary be a corporation, a partnership or an association. The election of any of the foregoing modes of settlement may be made by the insured and the beneficiary jointly; or, if the right to change the beneficiary has been reserved by the insured alone; or, after the death of the insured, if no election shall have been made by the beneficiary. If the policy be assigned, the assignee must join in any election. Such election shall be made by giving the company written notice at its home office. This policy, upon its maturity, if such election shall have been made, shall be surrendered to the company and a supplementary contract shall be issued for the mode of settlement elected. Such supplementary contract shall participate annually in the excess of interest earnings over three per centum per annum, at the same excess rate each year as is used in the dividend calculations of that year in the case of policies

issued in the same year as this policy, but if settlement be made under mode of settlement (3), only that part of the supplementary contract providing for instalments for the fixed period of twenty years shall participate. Unless otherwise specified in the written notice making election of one of the foregoing modes of settlement, the supplementary contract may at any time be surrendered to the company and the company will pay for the legal surrender thereof, (a) where mode of settlement (1) has been elected, the said net sum together with interest thereon to date of surrender at the rate of three per centum per annum for the fractional part of a year, if any, for which interest shall not have already been paid, (b) where any other of the above modes of settlement has been elected, the commuted or present value of the payments certain yet to be made, exclusive of participation, computed at three per centum interest, compounded annually; provided that no such surrender and commutation will be made under mode of settlement (3) except after the death of the beneficiary occurring within the aforesaid twenty years.

TABLE OF ANNUAL INSTALMENTS FOR EACH $1,000.

If so requested in writing when making the election, these instalments will be paid in fractional parts, semi-annually, quarterly, or monthly, the total of the fractional payments each year being equal to the annual payment provided for by this table. [13]

Mode of settlement (2)		Mode of settlement (3)					
Number of annual instal-ments	Amount of each annual instalment	Age of beneficiary at death of insured	Amount of each annual instalment	Age of beneficiary at death of insured	Amount of each annual instalment	Age of beneficiary at death of insured	Amount of each annual instalment
2	$507.39	10 and	$39.52	31	$45.39	53	$58.66
3	343.23	11 under	39.70	32	45.82	54	59.32
4	261.19	12	39.88	33	46.27	55	59.96
5	211.99	13	40.08	34	46.73	56	60.58
6	179.22	14	40.28	35	47.22	57	61.16
7	155.83	15	40.49	36	47.73	58	61.72
8	138.30	16	40.71	37	48.25	59	62.23
9	124.69	17	40.94	38	48.79	60	62.71
10	113.81	18	41.18	39	49.36	61	63.15
11	104.92	19	41.42	40	49.94	62	63.54
12	97.53	20	41.68	41	50.54	63	63.89
13	91.29	21	41.95	42	51.17	64	64.20
14	85.94	22	42.24	43	51.80	65	64.45
15	81.32	23	42.53	44	52.45	66	64.67

Mode of settlement (2)		Mode of settlement (3)					
Number of annual instal-ments	Amount of each annual instalment	Age of beneficiary at death of insured	Amount of each annual instalment	Age of beneficiary at death of insured	Amount of each annual instalment	Age of beneficiary at death of insured	Amount of each annual instalment
16	77.29	24	42.84	45	53.12	67	64.85
17	73.74	25	43.16	46	53.80	68	64.98
18	70.59	26	43.49	47	54.49	69	65.09
19	67.78	27	43.84	48	55.19	70	65.16
20	65.25	28	44.20	49	55.89	71	65.21
25	55.75	29	44.58	50	56.60	72	65.23
30	49.53	30	44.98	51	57.29	73 and	65.25
				52	57.98	over	

Agents are not authorized to modify this policy or to extend the time for paying a premium.

IN WITNESS WHEREOF the company has caused this policy to be executed this thirtieth day of March, 1913.

CHARLES A. PEABODY,
President.

W. J. EASTON,
Secretary.

Countersigned: (Illegible),
Registrar. [14]

THIS APPLICATION

Is made to THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK. All the following statements and answers, and all those that I make to the company's Medical Examiner, in continuation of this application, are true, and are offered to the company as an inducement to issue the proposed policy, which shall not take effect unless and until the first premium shall have been paid during my continuance in good health, and unless also the policy shall have been issued during my continuance in good health; except in case a binding receipt shall have been issued as hereinafter provided.

1. My full name is John A. Lipp.
2. I reside at Waucomah Farm, in the City of near Vancouver, County of Clarke, State of Washington.
3. My place of business is Waucomah Farm.

4. My P. O. address is Walucomah Farm, Vancouver, Wash.
5. My present occupation is Farmer in the following branch of business of trade: Farming.
6. My other occupations are same.
7. My former occupations have been same.
8. I do not contemplate going to any foreign country except: None.
9. My former residences were Clinton Co., Indiana.
10. The full name of the person to whom the policy is to be payable is Bertha E. Lipp.
11. Residing in Clarke Co., Washington.
12. The relationship of said beneficiary to me is wife.
13. The insurable interest of the said beneficiary in the life proposed for insurance, other than that of family relationship is none.
14. Do you wish the privilege of changing the beneficiary from time to time provided the policy has not been assigned? Yes.
15. I hereby apply for insurance on my life on the Limited Life plan, premiums payable for twenty years.
16. Amount, $3,000.00.
17. The premiums are to be paid ½ annually.
18. I was born on the 8th day of April, 1887, in Clinton Co., Indiana.
19. I am a citizen or subject of the U. S. A.
20. I have been accpeted for insurance under the

following policies in this company: None. [15]

21. I am insured in other companies and associations as follows: None, and in no others.
22. I have never made an application nor submitted to an examination for life insurance upon which a policy has NOT been issued on the plan and premium rate originally applied for, EXCEPT to the following companies or associations: None.
23. No negotiations for other insurance are now pending or contemplated except: None.

During the period of one year following the date of issue of the policy of insurance for which application is hereby made, I will not engage in any of the following extrahazardous occupations or employments; retailing intoxicating liquors, handling electric wires or dynamos, blasting, mining, submarine labor, aeronautic ascensions, the manufacture of highly explosive substances, service upon any railroad train or track or in switching or in coupling cars, or on any steam or other vessel, unless written permission is expressly granted by the company. It is understood and agreed that the risk of death will not be covered by the policy provided such death occur by my own act, whether sane or insane, during the period of one year next following the date of issue.

I have paid $——— in cash to the subscribing agent who has furnished me with a binding receipt therefor signed by the secretary of the company making the insurance in force from this date pro-

vided this application shall be approved and the policy duly issued.

Dated Portland 3/20/1913.

Signature of person whose life is proposed for insurance:

JOHN A. LIPP.

I have known the above-named applicant for *intorluced* and saw him sign this application. I have issued binding receipt No. ———.

J. B. MACKEN,
Soliciting Agent.

STATEMENTS TO MEDICAL EXAMINER.

1. What is your full name? John A. Lipp.
2. Age at last birthday. 25.
3. Are you married? Yes.
4. What illnesses, diseases or injuries have you had since childhood? (The examiner should satisfy himself that the applicant gives full and careful answers to this question.)
   Names of diseases etc: Typhoid.
   Number of attacks: One. Date of each: 1902. Duration: 12 weeks. Severity: Severe. Results: Cure. Date of complete recovery: 1902.
5. Have you stated in answer to question 4 all such illnesses, diseases or injuries? Yes.
6. State every physician who has prescribed for you or whom you have consulted in the past five years.

Name of physician. Address. When consulted. Nature of complaint. Give full details above under Q. 4. [16]

7. (a) Are you now in good health? Yes.
   (b) If not what is the impairment? ———.
8. Have you ever raised or spat blood? No.
9. (a) Have you a rupture or a hernia? No.
   (b) If so, do you wear a suitable truss?
10. Have you undergone any surgical operation? No.
11. Have you any bodily deformity? No.
12. Have you any impairment of sight or hearing? No.
13. (a) Do you use wine, spirits or malt liquors? Yes.
   (b) If so what kind have you used during the past year and how much in any one day at the most? Occasionally glass beer.
   (c) What has been your daily average in the past year? No daily average.
   (d) Have you been intoxicated during the past five years? No.
   (e) Have you ever taken treatment for alcoholic or drug habit? No.
   (f) If a total abstainer, how long have you been so? ———.
14. (a) Have you gained or lost weight in the past year? No.
   (b) If so how much and from what cause? ———.

15. (a) Have you ever been under treatment at any asylum, cure, hospital or sanitarium? No.

(b) If so when, how long and for what? ———.

16. (a) What is your present occupation? Farming.

(b) How long have you been engaged in this occupation? All life.

(c) What other occupation have you been engaged in? None.

(d) Do you contemplate making any change temporary or permanent, in your occupation? No.

(e) Are you now or have you ever been engaged in any way in the sale or manufacture of beer, wine, or other intoxicating liquors? No.

17. (a) Have you ever changed your residence on account of your health? No.

(b) Do you contemplate making any change in your place of residence? No.

18. Family record of applicant.

		Living		Dead		
		Age	Health	Age	Specific cause of death	How long sick
Father		48	Good.			
Mother		44	Good.			
Brothers.		Living		Dead		
		Age	Health	Age	Specific cause of death	How long sick
Number living.	Number dead.					
1	0	28	Good.			
Sisters.						
Number living.	Number dead.					
2	0	22	Good.			
		20	Good.			

Age of father's father if living. If not, age at death? 80.

Age of father's mother if living. If not, age at death? 80.

Age of mother's father if living. If not, age at death? 60.

Age of mother's mother if living. If not, age at death? 77. [17]

19. Has there ever been any suspicion that any one of those mentioned in (18) above ever had tuberculosis or consumption, insanity, epilepsy, paralysis, or cancer? Father's father. Cancer face.

20. Has any member of your household suffered from tuberculosis or consumption during the past year? No.

21. If so, give de*at*ils. ———

Dated at Portland, State of Oregon, the 30th day of March, 1913.

I certify that my answers to the foregoing questions are correctly recorded by the Medical Examiner.

JOHN A. LIPP.

Signature of the person examined.

Witness:

OTIS B. WEGHER (?) M.D.

WAIVER OF PREMIUM IN THE EVENT OF PERMANENT TOTAL DISABILITY.

The premium stated on the face of policy No. 2057529 (to which policy this agreement is attached and of which it forms a part) includes an additional premium of $0.30 payable for twenty full years, or until the prior death of the insured, and in consideration of the payment of such additional premium THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK hereby grants the following

WAIVER OF PREMIUM IN THE EVENT OF PERMANENT TOTAL DISABILITY.

If the insured, after payment of premiums for at least one full year and before default in the payment of any subsequent premium, and before attaining the age of sixty years, and while this policy is in full force, shall furnish proof satisfactory to the company, at its home office in the City of New York, that he has become wholly and permanently disabled by bodily injury or disease so that he is and will be permanently, continuously and wholly prevented thereby from performing any work for compensation or profit or from following any gainful occupation, and that such disability has existed continuously for not less than sixty days, the company will waive payment of premiums thereafter becoming due under this policy during the continuance of such disability. The premiums so waived shall not be deducted from the sum payable under the policy, and the values provided for in the paragraphs entitled "Loans" and "Options on Surrender or Lapse" and in the "Table of Loan and Surrender Values" shall be the same as if the premiums had continued to be paid to the company regularly when due. Provided that, notwithstanding proof of disability may have been accepted by the company as satisfactory, the insured shall at any time on demand, furnish to the company satisfactory proof of the continuance of such disability, and if the insured shall fail to furnish such proof, or if it shall appear to the company that the insured is able to perform

any work or to follow any occupation whatsoever for compensation, gain or profit, all premiums thereafter falling due shall be paid in conformity with the policy. [18]

Without prejudice to any other cause of disability, the entire and irrecoverable loss of the sight of both eyes, or the severance of both hands at or above the wrists, or of both feet at or above the ankles, or of one entire hand and one entire foot, will be considered as total and permanent disability within the meaning of this provision, and the company upon satisfactory proof of such loss or severance will waive the premiums thereafter becoming due under the policy.

After the premium stated on the face of the policy has been paid for the full number of years stated above, it will be reduced, if premiums are payable thereafter, by the amount of the above additional premium.

Dated at New York the 30th day of March, 1913.

CHARLES A. PEABODY,
President.

W. J. EASTON,
Secretary,

Countersigned: (Illegible),
Registrar. [19]

EXHIBIT "B"

PROOF OF DEATH—JOHN A. LIPP.

To the Mutual Life Insurance Company of New York:

The undersigned, Bertha E. Lipp, wife of John A. Lipp, and the beneficiary named in policies numbered 2,057,529 and 2,176,946, the former for the amount of $3,000.00 dated March 13, 1913, the latter for $2,000.00, dated September 15, 1914, issued to John A. Lipp, insuring his life against death, hereby gives notice to the Mutual Life Insurance Company of New York that said John A. Lipp died at or near Vancouver, in Clarke County, Washington, or at or near Portland, Oregon, on or about January 31, 1924.

The circumstances connected with and surrounding his death are as follows:

1st. On the 31st day of January, 1924, said John A. Lipp left his home for the purpose of going to Portland, Oregon, on a matter of business, fully intending to return the same day; he drove a Nash truck propelled by gasoline; he was alone and drove the truck as far as Vancouver, a distance of four miles from his home, and abandoned it there; he then rode with a friend to the outskirts of Portland near the the Columbia River, started toward and in the direction of the Columbia River and has never been seen or heard of since that time. His disappearance was reported to the officers of Vancouver and Portland and a search was made to find

him; his disappearance was given publicity by the newspapers of Portland and Vancouver; inquiry and search were made for him of many persons who knew him or who were likely to know of his whereabouts and in all places where there was a probability of his being, but no trace or word of him has ever been had by his family or the officers. A human skull was found by the officers in the month of January, 1926, in the Columbia River below Vancouver and Portland, which it is believed is that of the insured.

2nd. On the date of his disappearance and for some time prior thereto the mental condition of said John A. Lipp was such as to excite the anxiety of his family and friends; that is to say, he had suffered severe headaches, was unduly despondent and had threatened to commit suicide. On the morning of his departure (January 31st, 1924) he drove to the gate of the farm on which he resided, then stopped and for some moments looked back longingly toward his home and then drove away.

3rd. Said John A. Lipp was an honored and upright citizen, who through all of his life had enjoyed the confidence of all who knew him; he was solvent, prosperous and successful in his business affairs, rich in the affections and esteem of his wife, children and parents, devoted to them and attached to their society, with no habits contrary to those traits of character and he had never absented himself from his family. [20]

4th. His family believe him to be dead; that he committed suicide by drowning in the Columbia

River on said 31st day of January, 1924, and there is no other way or method of accounting for his disappearance.

The undersigned, Bertha E. Lipp, therefore respectfully demands payment, to her, through her attorney, H. F. McInturff, 321 Chamber of Commerce Building, Portland, Oregon, of said policies, i. e., for $5,000.00 with interest thereon from this date at the rate of 6% per annum.

Dated at Portland, Oregon, this 26th day of Apr., 1926.

(Sgd.) BERTHA E. LIPP.

State of Oregon,
County of Multnomah,—ss.

I, Bertha E. Lipp, being first duly sworn, on my oath say that I have signed the foregoing proof of death, know the contents thereof, and that the matters and things therein stated are true as I verily believe.

(Sgd.) BERTHA E. LIPP.

Subscribed and sworn to before me this 26th day of April, 1926.

[Seal] (Sgd.) H. F. McINTURFF,
Notary Public.

My commission expires March 12, 1930.

State of Oregon,
County of Multomah,—ss.

We, Lyle J. Lipp and Reta Lipp, being each duly sworn, on oath say that I, Lyle J. Lipp, am the son of said John A. Lipp, nineteen years of age; I, Reta Lipp, am the daughter of said John A. Lipp. I

have read the foregoing proof of death of John A. Lipp, signed and sworn to by Bert*ah* E. Lipp, and I believe the facts therein stated to be true. My father, John A. Lipp, was a devoted and affectionate parent, deeply attached to me and the other members of his family. I am confident that were he alive he would have come home long ago or made his whereabouts known to his family. I sincerely believe him to be dead and cannot account for his disappearance in any other way.

(Sgd.) LYLE J. LIPP.
(Sgd.) RETA LIPP.

Subscribed and sworn to before me this 24th day of April, 1926.

[Seal] (Sgd.) H. F. McINTURFF,
Notary Public.

My commission expires March 12, 1930. [21]

EXHIBIT "C."

SUPPLEMENTAL PROOF OF DEATH—JOHN A. LIPP. POLICIES No. 2,057,529 and 2,176,946, AGGREGATING $5,000.

To Mutual Life Insurance Company of New York:

On May 27, 1926, I mailed you proofs of death of John A. Lipp, who held policies above described and in which I am named as the beneficiary. On June 4, 1926, you acknowledged receipt thereof to my attorney, H. F. McInturff, denying any liability in the premises, for the reason "that the same (proofs of death) are not sufficient to satisfactorily prove the death of John A. Lipp." For the purpose

of overcoming your objection, I am furnishing you the following additional data as to the disappearance and death of said insured, which I furnish as a supplement to said former proofs of May 27th, 1926, and request you to consider them a part thereof, viz.:

(a) On January 31, 1924, when he left his home for the purpose of going to Portland, as he stated in paragraph 1st of said proofs of death, he, (John A. Lipp) had no clothing with him except such as he had on his person, and he had with him no money except sufficient to pay the expense incidental to his trip to Portland, not to exceed $8.00.

(b) Said John A. Lipp idolized our daughter Reta, then approaching her sixteenth birthday, Feb. 1st, 1924. He had arranged a birthday party for her, and to that end had painted, papered and otherwise fixed up and beautified our humble home. He entered into the matter with the spirit, zeal and enthusiasm of a boy, and though suffering and at times despondent as stated in paragraph 2nd of said proofs of death, he was joyous at the approach of the event, which to him was the event of a lifetime. That he should particularly at such a time abandon us with no word of an intention to do so, is utterly unreasonable and contrary to all human experience.

(c) I have had a diagram made by Dr. E. F. Newton, a dentist of Cathlamet, Washington, of the upper and lower jaws of the skull found in the Columbia River, referred to in paragraph 1st of said [22] proofs of death, showing the condition

of the teeth, the absence of some and the fillings in others, which corresponds with the condition of Mr. Lipp's teeth at or about the time of his disappearance, with a few exceptions, caused as I believe by exposure to the elements for a long period of time, and I am therefore reasonably confident that the skull is that of John A. Lipp.

(d) If there are any other matters concerning which you want information, I will be pleased to give you them.

I now once more respectfully demand payment to me through my attorney, H. F. McInturff, 321 Chamber of Commerce Building, Portland, Oregon, of said policies, aggregating $5,000.00, with interest at six per cent (6%) from April 26th, 1926.

(Sgd.) BERTHA E. LIPP.

State of Oregon,
County of Multomah,—ss.

I, Bertha E. Lipp, being first duly sworn, on my oath say: I have read the foregoing supplemental proofs of death, I know the contents thereof and that the matters and things therein stated are true as I verily believe.

(Sgd.) BERTHA E. LIPP.

Subscribed and sworn to before me this —— day of July, 1926.

[Seal] (Sgd.) H. F. McINTURFF,
Notary Public for Oregon.

My commission expires March 12, 1930.

State of Oregon,
County of Multomah,—ss.

I, Bert*ah* E. Lipp, being first duly sworn, depose and say that I am the plaintiff in the above-entitled action; and that the foregoing complaint is true as I verily believe.

(Sgd.) BERTHA E. LIPP,

Subscribed and sworn to before me this 8 day of August, 1927.

[Seal] H. F. McINTURFF,
Notary Public for Oregon.

My commission expires 3/12/30.
Filed September 8, 1927. [23]

AND AFTERWARDS, to wit, on the 20th day of September, 1927, there was duly filed in said court an answer, in words and figures as follows, to wit: [24]

[Title of Court and Cause.]

ANSWER.

Comes now the defendant and for its answer to the complaint of plaintiff—

I.

Denies all knowledge or information sufficient to form a belief as to the allegations contained in Paragraph I.

II.

Admits the allegations of Paragraph II.

III.

Admits the allegations of Paragraph III.

IV.

Denies each and every allegation contained in Paragraph IV.

V.

Admits that on or about the 3d day of March, 1913, John A. Lipp signed a written application to the defendant for a $3,000.00 policy insuring the life of the said John A. Lipp and that on the 30th day of March, 1913, the defendant issued to the said John A. Lipp its policy Number 2,057,529, calling for a semi-annual premium of $50.79 payable on the 30th of September and the 30th of March in each year subsequent to the date of said policy. Denies each and every other allegation contained in Paragraph V and denies that the policy issued was in form as set forth in Exhibit "A" attached to the complaint.

VI.

Denies each and every allegation contained in Paragraph VI except that the defendant admits that the said John [25] A. Lipp paid the premiums on the said policy of life insurance down to and including March 30th, 1924.

VII.

Denies each and every allegation contained in Paragraph VII.

VIII.

Denies each and every allegation contained in Paragraph VIII.

IX.

Denies each and every allegation contained in Paragraph IX except that the defendant admits that on the 26th of April, 1926, plaintiff mailed a communication to the defendant and demanded therein the payment by the defendant of the insurance policy above referred to.

X.

Denies each and every allegation contained in Paragraph X except that the defendant admits that it denied and continues to deny its liability to plaintiff for the payment of any money on the insurance policy above referred to.

XI.

Denies each and every allegation contained in Paragraph XI except that defendant admits that plaintiff, in the summer of 1926, mailed to defendant a communication entitled "Supplemental Proof of Death."

XII.

Denies each and every allegation contained in Paragraph XII except that the defendant admits that it denied and still denies its liability to the plaintiff for the payment to the plaintiff of any money on the policy of life insurance above referred to, and that defendant was satisfied and still is satisfied that the said John A. Lipp is not dead.

XIII.

Denies each and every allegation contained in Paragraph XIII. [26]

WHEREFORE the defendant demands judgment that plaintiff take nothing by her action herein and that the defendant recover its costs and disbursements.

McCAMANT and THOMPSON,
Attorneys for Defendant.

District of Oregon,—ss.

I, Alma D. Katz, being duly sworn do depose and say that I am the general managing agent in Oregon of the above-named defendant and that the foregoing answer is true as I verily believe.

ALMA D. KATZ.

Subscribed and sworn to before me this 19th day of September, 1927.

[Seal] PAUL F. NOLAN,
Notary Public for Oregon.

My commission expires ————.

Due service of the within answer is admitted this 20th day of September, 1927. On approval:

H. F. McINTURFF,
By ROBERT MEARS,
Attorneys for Plaintiff.

Filed September 20, 1927. [27]

AND AFTERWARDS, to wit, on Friday, the 2d day of March, 1928, the same being the 91st judicial day of the regular November term of said court—Present, the Honorable JOHN H. McNARY, United States District Judge, presiding—the following proceedings were had in said cause, to wit: [28]

[Title of Court and Cause.]

MINUTES OF COURT—MARCH 2, 1928—TRIAL.

Now at this day come the parties hereto by their counsel as of yesterday, whereupon the jury impaneled herein come into court, answer to their names and return to the Court their duly sealed verdict in words and figures as follows, viz.:

"We, the jury duly empaneled and sworn to try this cause, find for the plaintiff and assess her damages at $3,535.00 with interest thereon at 6% per annum from July 20th, 1926, to date, aggregating $342.30.

We also find that $800.00 is a reasonable attorney fee to be allowed the plaintiff for bringing and prosecuting this action.

Wherefore, we find our verdict in favor of the plaintiff and against the defendant in the aggregate sum of $4,677.30.

W. H. DURHAM,
Foreman."

which verdict is received by the Court and ordered to be filed. Whereupon

IT IS ADJUDGED that plaintiff do have and recover of and from said defendant said sum of $3,535.00 assessed as damages in said verdict, with interest thereon at 6% per annum from July 20th 1926, to date, aggregating $342.30, together with $800.00 attorney fee, making a total of $4,677.30, together with the plaintiff's costs and disbursements herein taxed in the sum of $46.35 and that plaintiff have execution therefor. [29]

AND AFTERWARDS, to wit, on the 2d day of March, 1928, there was duly filed in said court a verdict, in words and figures as follows, to wit: [30]

[Title of Court and Cause.]

VERDICT.

We, the jury duly empaneled and sworn to try this cause, find for the plaintiff and assess her damages at $3,535.00, with interest thereon at 6% per annum from July 20th, 1926, to date, aggregating $342.30.

We also find that $800.00 is a reasonable attorney fee to be allowed the plaintiff for bringing and prosecuting this action.

WHEREFORE, we find our verdict in favor of the plaintiff and against the defendant in the aggregate sum of $4,677.30.

W. H. DURHAM,
Foreman.

Filed March 2, 1928. [31]

AND AFTERWARDS, to wit, on the 19th day of March, 1928, there was duly filed in said court a notice of appeal, in words and figures as follows, to wit: [32]

[Title of Court and Cause.]

NOTICE OF APPEAL.

To Bertha E. Lipp, the Above-named Plaintiff, and to Messrs. H. F. McInturff, Wm. T. Stoll and J. W. McInturff, Her Attorneys:

YOU ARE HEREBY NOTIFIED that defendant asserts that in the trial of the above-entitled cause certain errors were committed to the prejudice of defendant, all of which will more in detail appear from the assignment of errors which is filed with this notice of appeal, and that defendant appeals from the judgment made and entered in the above-entitled cause on the 2d day of March, 1928, and the whole thereof, to the United States Circuit Court of Appeals for the Ninth Circuit, for the correction of the errors so complained of.

McCAMANT & THOMPSON,
RALPH H. KING,
Attorneys for Defendant.

Due service of the within notice of appeal is admitted this 19th day of March, 1928.

H. F. McINTURFF,
Of Attorneys for Plaintiff.

Filed March 19, 1928. [33]

AND AFTERWARDS, to wit, on the 19th day of March, 1928, there was duly filed in said court an assignment of errors, in words and figures as follows, to wit: [34]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

Now on this 19th day of March, 1928, comes the defendant, The Mutual Life Insurance Company of New York, by its attorneys, McCamant & Thompson and Ralph H. King, and says that the judgment entered in the above cause on the 2d day of March, 1928, is erroneous and unjust to the defendant for the following reasons:

I.

That the District Court of the United States for the District of Oregon erred in receiving in evidence as Plaintiff's Exhibit "I" the record of the complaint, answer, verdict and judgment in that certain case between Bertha E. Lipp, plaintiff, and The Mutual Life Insurance Company of New York, a corporation, defendant, in the Circuit Court of the State of Oregon for Coos County over the objection and exception of defendant; that the same was incompetent, irrelevant and immaterial and not embraced within the issues of the present action, and that the effect of such judgment had not been pleaded as an estoppel or in any manner.

II.

That the District Court of the United States for

the [35] District of Oregon erred in sustaining the objection of plaintiff and refusing to admit in evidence the following proof offered by the defendant upon the issue as to the death of John E. Lipp, the insured:

The deposition of Leo Van Atta, marked Defendant's Exhibit "A" for Identification.

The certified copy of mortgage, dated July 26, 1923, by J. A. Lipp to Vancouver National Bank, marked Defendant's Exhibit "B" for Identification.

A certified copy of a partial lease of the foregoing mortgage, marked Defendant's Exhibit "C" for Identification.

A certified copy of the complaint and affidavit for publication in that certain suit in the Superior Court of the State of Washington for Clarke County, wherein Bertha E. Lipp is plaintiff and John A. Lipp is defendant, marked Defendant's Exhibit "D" for Identification.

A certified copy of the interlocutory order in the same suit, bearing date November 23, 1925, marked Defendant's Exhibit "E" for Identification.

The offer of proof of the testimony of John Egger.

The offer of proof of the testimony of E. M. Dietrich.

The offer of proof of the testimony of M. G. Osborne.

The offer of proof of the testimony of Lewis Kadow.

The offer of proof of the testimony of William A. Thompson.

The offer of proof of the testimony of W. P. Davis.

The offer of proof of the testimony of Henry Huber.

The offer of proof of the testimony of John Schmander.

The offer of proof of the testimony of Charles W. Hall.

The offer of proof of the testimony of E. S. Lipp.

The offer of proof of the testimony of Emma Lipp.

The offer of proof of the testimony of J. B. Macken.

The offer of proof of the testimony of Alma D. Katz. [36]

The offer of proof of the testimony of Dr. Charles Folsom,

all witnesses called for and on behalf of defendant, and to which offers of proof the plaintiff objected, first, because those matters were all investigated and litigated in a former action between the same parties and a final adjudication had thereon; second, because the same is incompetent, irrelevant and immaterial and may not be admitted to impeach, contradict, vary, gainsay, or deny the judgment and verdict rendered between the plaintiff and defend-

ant in the trial in the Circuit Court of Coos County in March, 1926.

III.

That the District Court of the United States for the District of Oregon erred in giving to the jury the following instruction:

> "I will say, in the first instance, that as to the death of the deceased, that matter was formerly litigated between these parties, in an action commenced in Coos County, Oregon. In that action there was an issue raised upon the question as to whether the deceased, Lipp, died on the 31st day of January, 1924. That issue was determined in favor of the plaintiff, and, so far as this case is concerned, it is conclusive upon the parties to this action. So you will assume that the deceased died on that date, as set forth in the complaint."

over the following exception of the defendant:

> "Defendant desires to except, if the court please, to the instruction of the court that the defendant is concluded in this action as to the issue of the death of John A. Lipp by reason of the judgment in the former action in Coos County." [37]

WHEREFORE, the defendant prays that the said judgment made and entered on the 2d day of March, 1928, be reversed and that the District Court of the United States for the District of Oregon be directed to reverse said judgment and to direct a verdict in favor of said defendant and to award

said defendant its costs and disbursements incurred in said action.

McCAMANT & THOMPSON,
RALPH H. KING,
Attorneys for Defendant.

Due service of the within assignment of errors is admitted this 19th day of March, 1928.

H. F. McINTURFF,
Of Attorneys for Plaintiff.

Filed March 19, 1928. [38]

AND AFTERWARDS, to wit, on the 19th day of March, 1928, there was duly filed in said court a bond on appeal, in words and figures as follows, to wit: [39]

[Title of Court and Cause.]

BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS, That we, The Mutual Life Insurance Company of New York, a corporation organized and existing under the laws of the State of New York, as principal, and United States Fidelity & Guaranty Company, a corporation organized and existing under the laws of the State of Maryland, as surety, are held and firmly bound unto Bertha E. Lipp, plaintiff herein, in the full and just sum of Six Thousand Dollars ($6,000.00), to be paid to the said plaintiff, her attorneys, executors, administrators

or assigns, to which payment well and truly to be made we bind ourselves, our successors and assigns, jointly and severally by these presents.

Sealed with our seals this 19th day of March, A. D. 1928.

WHEREAS lately in the District Court of the United States for the District of Oregon, in an action in said court between Bertha E. Lipp, plaintiff, and The Mutual Life Insurance Company of New York, defendant, a judgment was rendered against the said The Mutual Life Insurance Company of New York, defendant, [40] for the sum of $3,535.00, and the further sum of $342.30 interest, and the further sum of $800.00 attorneys fees, and for costs taxed in the amount of $46.35; and the said The Mutual Life Insurance Company of New York having taken its appeal from said judgment and the whole thereof, to the United States Circuit Court of Appeals for the Ninth Circuit, and filed its notice of appeal in the Clerk's office of said court, to reverse the judgment in the aforesaid action;

Now, the condition of the above obligation is such that if the said The Mutual Life Insurance Company of New York shall prosecute its appeal to effect or shall pay the aforesaid judgment and answer all damages for costs, if it fail to make the said plea good, then the above obligation to be void; otherwise to remain in full force and virtue.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK.

By RALPH H. KING,

Of Its Attorneys.

UNITED STATES FIDELITY & GUARANTY COMPANY,
By WALTER F. CLINE,
Its Attorney-in-fact.

[Seal]

Countersigned: By WALTER F. CLINE,
Resident Agent.

Due service of the within bond on appeal is admitted this 19th day of March, 1928.

H. F. McINTURFF,
Of Attorneys for Plaintiff.

Filed March 19, 1928. [41]

AND AFTERWARDS, to wit, on the 19th day of March, 1928, there was duly filed in said court a praecipe for the transcript of record, in words and figures as follows, to wit: [42]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD.

The Clerk of this court is hereby directed to prepare and certify copy of the record in the above-entitled cause for the use of the United States Circuit Court of Appeals for the Ninth Circuit, including the following documents:

Complaint.
Answer.
Verdict.
Judgment.

Notice of appeal.
Bond on appeal.
Citation on appeal.
Assignment of errors.
Praecipe for transcript of record.
Bill of exceptions.

McCAMANT & THOMPSON,
RALPH H. KING,
Attorneys for Defendant.

Due service of the within praecipe for transcript of record is admitted this 19th day of March, 1928.

H. F. McINTURFF,
Of Attorneys for Plaintiff.

Filed March 19, 1928. [43]

AND AFTERWARDS, to wit, on the 26th day of March, 1928, there was duly filed in said court a bill of exceptions, in words and figures as follows, to wit: [44]

[Title of Court and Cause.]

BILL OF EXCEPTIONS.

BE IT REMEMBERED, That the above-entitled cause came on regularly for trial before the Hon. John H. McNary, Judge of the above-entitled court, and a jury, on Thursday, the 1st day of March, 1928, and plaintiff appearing in person and by her attorneys, H F. McInturff, J. W. McInturff, and Wm. T. Stoll, and the defendant appearing by its

(Testimony of W. Y. Masters.)

attorneys, McCamant & Thompson and Ralph H. King, and thereupon the following proceedings were had and testimony taken, to wit:

TESTIMONY OF W. Y. MASTERS, FOR PLAINTIFF.

W. Y. MASTERS, a witness called for plaintiff, testified that he was a practicing attorney, and as to reasonable attorneys' fees for prosecution of the present action.

Thereupon the following proceedings were had:

"Mr. McINTURFF.—We now offer this record in evidence, being the record of the complaint, the answer, the verdict and the judgment in that certain case between Bertha E. Lipp, plaintiff, and the Mutual Life Insurance Company of New York, a corporation, defendant.

COURT.—Let me ask—is the identity of the plaintiff and the defendant disputed?

Mr. KING.—No, it is not, your Honor.

COURT.—It will be admitted.

Mr. KING.—I would like to object to the offer, if the Court please, on the ground it is incompetent, irrelevant and immaterial, is not embraced within the issues of the present action, [45] and the effect of such judgment has not been pleaded as an estoppel, or in any other manner.

COURT.—The objection will be overruled.

Mr. KING.—Exception allowed, please.

COURT.—Yes."

Thereupon the judgment-roll was marked as Plaintiff's Exhibit 1.

TESTIMONY OF BERTHA E. LIPP, IN HER OWN BEHALF.

BERTHA E. LIPP, plaintiff, was called as a witness for herself and testified that she was a resident of the State of Oregon.

Like testimony was given by Rita Lipp, Leila Bushman, Lyle Lipp and Margaret L. Ackley.

TESTIMONY OF PAUL F. NOLAN, FOR PLAINTIFF.

PAUL F. NOLAN, called as a witness for plaintiff, fixed the amount of insurance in force upon the policy of insurance as $3,535.00.

TESTIMONY OF JOHN B. CLELAND, FOR PLAINTIFF.

JOHN B. CLELAND, a witness for plaintiff, testified as to what sum would be reasonable as attorneys fees to be allowed plaintiff.

Plaintiff introduced policy of insurance in evidence as Plaintiff's Exhibit 2, and proofs of death were admitted in evidence on behalf of plaintiff as Plaintiff's Exhibit 3.

Thereupon plaintiff rested her case.

Thereupon the following proceedings were had:

"Mr. KING.—If the Court please, in order that I may make a record in this case, I would like to draw a chair up to the reporter and dictate, in your Honor's hearing, an offer of proof; the proof by

each individual witness being considered as a several offer of proof, so that we won't have to go through all the objections and offers as I dictate it, but each offer being separate as far as the record is concerned.

COURT.—Do you mean to say you want to offer proof upon your part to show that the insured is not dead?

Mr. KING.—It won't be a very long offer, but I want to make the record. [46]

COURT.—I don't see what the purpose of that would be. I don't see how that would better your situation.

Mr. KING.—There is some question in my mind whether I have a complete record without making such offer. It won't take very many minutes. I don't think counsel wants to insist on my bringing the witnesses into court in order to do it.

COURT.—Very well. Gentlemen of the Jury, you may be excused for, say, fifteen minutes, but remain within call.

Mr. KING.—At this time the defendant makes the following offers of proof, asking that each of the several documents and the testimony of each of the several witnesses be, for the purpose of the record, considered a several offer, and that, if the Court reject all of said testimony, the defendant have and save an exception to the rejection of each of the said several offers.

The defendant requests the Court to take judicial knowledge of section 2601, including all its sub-

divisions, of Remington's Compiled Code of 1922, Statutes of Washington; section 2602, section 2603 and section 2605 of the same compilation of statutes.

The defendant asks that the deposition of Leo Van Atta be marked for identification, and offers the testimony of such witness in evidence.

(Marked Defendant's Exhibit "A" for Identification.)

The defendant offers certified copy of that mortgage dated July 26, 1923, by J. A. Lipp of Vancouver, mortgagor, to Vancouver National Bank of Vancouver, and asks that the same be marked for the purpose of identification.

(Marked Defendant's Exhibit "B" for Identification.)

The defendant offers a partial release of the foregoing mortgage, the same being executed under date of June 27, 1924.

(Marked Defendant's Exhibit "C" for Identification.)

Defendant offers a certified copy of the complaint and affidavit for publication in that certain suit, being No. 10377, in the Superior Court of the State of Washington for Clarke County, wherein Bertha E. Lipp is plaintiff and John A. Lipp defendant, together with a certified copy of the affidavit of publication in said suit, both being certified under one certificate, and asks that same be marked for identification.

(Marked Defendant's Exhibit "D" for Identification.) [47]

(Testimony of John Egger.)

Defendant also offers a certified copy of the interlocutory order in the same suit, bearing date November 23, 1925.

(Marked Defendant's Exhibit "E" for Identification.)

TESTIMONY OF JOHN EGGER, FOR DEFENDANT.

JOHN EGGER, if permitted to testify, would state that he has known John A. Lipp for twelve years; that he worked on Waucomah Farm with John A. Lipp from 1916 to the year 1920; that he saw John A. Lipp every day, and talked to him; that Lipp's disposition was cheerful; that he recalls the occasion of the accident to John Lipp in the cornfield, while operating the tractor, and that such accident, beyond incapacitating John Lipp for several days, did not change his mental attitude in any respect.

TESTIMONY OF E. M. DIETRICH, FOR DEFENDANT.

E. M. DIETRICH, a witness for the defendant, if permitted to testify, would state that he has known John Lipp for eight years prior to his disappearance; that Lipp purchased supplies at the hardware store conducted by witness in Vancouver, Washington; that on the afternoon of January 31, 1924, he went out on a repair job, and at the edge of the City of Vancouver, near the shipyards, he

(Testimony of E. M. Dietrich.)
saw John A. Lipp standing beside the Waucomah Farm truck and talking to one Harry S. Smith, a business man of Vancouver; that he knows the community reputation in the City of Vancouver as to whether John A. Lipp is dead or alive, and that said community reputation is that John A. Lipp is alive.

TESTIMONY OF M. G. OSBORNE, FOR DEFENDANT.

M. G. OSBORNE, a witness for defendant, if permitted to testify, would state that he is a business man in Vancouver; that he knew Lipp for eight years prior to his disappearance, and would give the same testimony as the witness Dietrich with respect to community reputation.

TESTIMONY OF WILLIAM A. THOMPSON, FOR DEFENDANT.

WILLIAM A. THOMPSON, a witness for defendant, if permitted to testify, would state that he is ex-sheriff of Clarke County, Washington; that he was sheriff at the time of the disappearance of John A. Lipp; that as sheriff he conducted an investigation into the disappearance of John A. Lipp; that he knows the community reputation as to whether the said John A. Lipp is dead or alive, and that such reputation is that John A. Lipp is alive.

TESTIMONY OF LEWIS KADOW, FOR DEFENDANT.

LEWIS KADOW, a witness for defendant, if permitted to testify, would state that he operates a farm near Waucomah Farm; that he knew John Lipp well during the twelve years that he was on Waucomah Farm; that he was on the school board with John Lipp; that Lipp had a cheerful, jolly disposition; that he knows the community reputation and the neighborhood reputation as to [48] whether John A. Lipp is dead or alive, and that said general reputation is that John A. Lipp is alive.

TESTIMONY OF W. P. DAVIS, FOR DEFENDANT.

W. P. DAVIS, a witness for defendant, if permitted to testify, would state that he knew John A. Lipp for fifteen years prior to his disappearance; that he was the treasurer of the Farmers' Telephone Lines, to which are connected both Waucomah Farm and his own home; that John A. Lipp never paid to him any money collected for said telephone line from Henry Huber, a neighbor of both Lipp and himself; that Lipp was cheerful and jolly in his disposition. His testimony as to the neighborhood reputation would be the same as that of the witness Kadow. He would further testify that he saw Lipp on the day of his disappearance at six o'clock in the morning; that Lipp stopped at his place to fix a tail light on the farm truck.

TESTIMONY OF HENRY HUBER, FOR DEFENDANT.

HENRY HUBER, a witness for defendant, if permitted to testify would state that he knew John A. Lipp for fifteen years prior to his disappearance; that he was on very friendly and intimate acquaintance with John A. Lipp; that during the two years prior to John A. Lipp's disappearance on a number of occasions John A. Lipp discussed with him his situation on Waucomah Farm, and stated to him that he was dissatisfied, that he was unable to save any money, and that his family associations were not satisfactory; that he contemplated going to South America, particularly the State of Argentina, in the cattle business; that on January 21, 1924, he gave Lipp a check for $60 for his part of the Farmers' Mutual Telephone Line; that John Lipp cashed said check on January 22, but never paid over the said funds to W. P. Davis, treasurer of said mutual telephone lines.

TESTIMONY OF JOHN SCHMANDER, FOR DEFENDANT.

JOHN SCHMANDER, a witness for defendant, if permitted to testify, would state that he knew Lipp for six years prior to his disappearance; that witness is engaged in the business of buying cattle, and in such business frequently saw John Lipp; that on or about December 1, 1923, John Lipp came

(Testimony of John Schmander.)
to him and requested him, on the basis of friendship, to loan him $500; that he granted the request to the said John A. Lipp, who promised to repay said amount in thirty days; that John Lipp failed to repay the same in thirty days, and furnished as an excuse therefor the fact that he had not yet dug his potatoes; that the said John A. Lipp never did repay said amount. [49]

TESTIMONY OF CHARLES W. HALL, FOR DEFENDANT.

CHARLES W. HALL, a witness for defendant, if permitted to testify, would state that Mrs. Lipp consulted him as an attorney; that she desired to assert a claim against personal property on Waucomah Farm; that he instituted a suit for divorce against John A. Lipp; that after said suit had been commenced, and after an interlocutory decree had been secured, Mrs. Lipp came to him and instructed him to dismiss said suit; that said suit was not dismissed pursuant to his advice.

TESTIMONY OF E. S. LIPP, FOR DEFENDANT.

E. S. LIPP, a witness for defendant, if permitted to testify, would state that he is the father of John Lipp; that he resides at Salem; that John Lipp visited back and forth about once a year; that John Lipp was not much of a person to write—that he seldom, if ever, received a letter from him; that

(Testimony of E. S. Lipp.)
John Lipp made a visit to the witness' home in Salem in April, 1923, and at such time discussed his intention of going to South America to look over the cattle business down there; that John Lipp's front teeth were not loose; that he did not have pyorrhea; that witness does not believe him to be dead.

TESTIMONY OF EMMA LIPP, FOR DEFENDANT.

EMMA LIPP, a witness for defendant, if permitted to testify, would state that she is the mother of John Lipp; that she recalls the time of his disappearance; that about two months thereafter Bertha E. Lipp, the plaintiff in this action, came to her home near Salem, Oregon; that at such time and place Bertha E. Lipp berated her husband, John A. Lipp, for many shortcomings; that prior to February 15, 1927, Mrs. Bertha E. Lipp and her attorney came to see the witness and her husband, and asked them to swear that they thought John Lipp was dead; that witness and her husband refused said request; that John Lipp's front teeth were not loose; that he did not have pyorrhea; that within a year prior to his disappearance John Lipp discussed with witness his intention of going to South America to look over the cattle business, and further told her that he had found out how much it would cost for said trip, and that the amount was $300.

TESTIMONY OF J. B. MACKEN, FOR DEFENDANT.

J. B. MACKEN, a witness for defendant, if permitted to testify, would state that, on January 31, 1924, he was requested by Mr. Katz to accompany him to the Vancouver National Bank, in Vancouver, Washington; that he acceded to said request, and went to said bank; that a conference was held, at which he was not present, and that thereafter he and Dr. Wight drove out on the river road near the old shipyard, and there discovered the farm truck of Waucomah Farm, abandoned. [50]

TESTIMONY OF ALMA D. KATZ, FOR DEFENDANT.

ALMA D. KATZ, a witness for defendant, if permitted to testify would state that no partnership agreement was ever made with the said John A. Lipp; that on January 31, 1924, he was advised that the Vancouver National Bank claimed a mortgage on some personal property on Waucomah Farm; that he denied the validity of said mortgage; that a conference was held at Vancouver National Bank, and that at such conference it was agreed to call in John A. Lipp; that he placed a telephone call for John A. Lipp, and upon reaching him on the telephone requested him to come to the bank; that he never arrived at the bank, and that thereafter Dr. Wight, who was at the conference, left for Waucomah Farm, and discovered the farm truck abandoned near the shipyards.

TESTIMONY OF DR. CHARLES FOLSOM, FOR DEFENDANT.

Dr. CHARLES FOLSOM, a witness for defendant, if permitted to testify, would state that he is a practicing dentist in the city of Portland; that he did dental work for John A. Lipp on February 25, 1922; that said work consisted of a filling in the upper right bicuspid and a like filling in the upper left bicuspid, consisting of the occlusal and distal surfaces.

Mr. STOLL.—All of which is objected to by plaintiff, because first, those matters were all investigated and litigated in a former action between the same parties, and a final adjudication had thereon.

Second, the same is incompetent, irrelevant and immaterial, and may not be admitted to impeach, contradict, vary, gainsay, or deny the judgment and verdict rendered between plaintiff and defendant in the trial in the Circuit Court of Coos County in March, 1926.

Mr. McINTURFF.—Would you make one further statement: that the purpose of all that testimony would be to tend to prove that John A. Lipp was not dead?

Mr. KING.—It shows that on the face.

Mr. McINTURFF.—Will you make that statement? Otherwise, I would like to hear it all.

If you offer that merely for the purpose of tending to show or prove, if you will, that John A. Lipp

is not dead, and did not die on that date, then I think the Court can properly overrule it all. Otherwise, we would like to hear it all; if there is any statement in there relative to her citizenship, of course, that is competent, or attorney's fees—those matters that are in controversy.

Mr. KING.—I can straighten that out by saying, defendant offers said foregoing several offers of proof upon the issue as to the death of John A. Lipp only. [51]

COURT.—I will sustain the objection.

Mr. KING.—We will save an exception to the rejection of several offers of proof.

COURT.—Very well."

Thereupon the defendant rested.

Thereupon the Court instructed the jury, among other things, as follows:

> "I will say, in the first instance, that as to the death of the deceased, that matter was formerly litigated between these parties, in an action commenced in Coos County, Oregon. In that action there was an issue raised upon the question as to whether the deceased, Lipp, died on the 31st day of January, 1924. That issue was determined in favor of the plaintiff, and, so far as this case is concerned, it is conclusive upon the parties to this action. So you will assume that the deceased died on that date, as set forth in the complaint."

Thereupon the defendant excepted to the instruction set out hereinabove, which exception was allowed, as follows:

"Mr. KING.—Defendant desires to except, if the Court please, to the instruction of the Court that the defendant is concluded in this action as to the issue of the death of John A. Lipp by reason of the judgment in the former action in Coos County.

COURT.—You may have your exception."

CERTIFICATE OF JUDGE TO BILL OF EXCEPTIONS.

Now, being willing that a record should be made of the testimony and proceedings had at the said trial within the time allowed by the rules of this Court and fixed by its special order made in this cause for settlement of defendant's bill of exceptions, I, John H. McNary, Judge of the District Court of the United States for the District of Oregon, do hereby certify that the foregoing bill of exceptions contains a full, true and correct statement in narrative form of all and the whole of testimony taken and proceedings had upon the trial of said cause, and [52] that there is set forth therein in narrative form a full, true and correct statement of all the testimony and evidence that was before the Court; and that, with the said exhibits marked Plaintiff's Exhibits 1, 2 and 3 respectively, defendant's said bill of exceptions contains all and the whole of the evidence that was before the Court.

There is filed herewith and made a part of the record in this cause all of the exhibits offered and received in evidence in the trial of the cause, Plain-

tiff's Exhibits 1, 2 and 3. There is also filed herewith and made a part of the record in this cause Defendant's Exhibits "A," "B," "C," "D" and "E" for identification, which exhibits were offered by the defendant and, upon the objection of the plaintiff, were not received in evidence, all of which more fully appears in the foregoing bill of exceptions, and I hereby settle and allow this bill of exceptions this 26th day of March, 1928.

JOHN H. McNARY,
District Judge. [53]

Now, within the time allowed by the rules of this court and special orders made and entered herein extending the time in which defendant may enter its bill of exceptions herein defendant hereby presents and tenders for settlement this bill of exceptions this —— day of March, 1928.

_____,
_____,
Attorneys for Defendant.

District of Oregon,
County of Multnomah,—ss.

Due service of the within bill of exceptions is admitted this 19th day of March, 1928.

H. F. McINTURFF,
Of Attorneys for Plaintiff.

Filed March 26, 1928. [54]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

United States of America,
District of Oregon,—ss.

I, G. H. Marsh, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that the foregoing pages, numbered from three to fifty-four, inclusive, constitute the transcript of record upon appeal from the judgment entered in a case in said court in which Bertha E. Lipp is plaintiff and appellee and The Mutual Life Insurance Company of New York, a corporation, is defendant and appellant; that the said transcript has been by me compared with the original record thereof and is a full, true and complete transcript of the record and proceedings had in said court in said cause, as the same appear of record and on file at my office and in my custody.

I further certify that the cost of the foregoing transcript is $20.00, and that the same has been paid by the said appellant.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Portland, in said District, this 26th day of April, 1928.

[Seal] G. H. MARSH,
Clerk. [55]

[Endorsed]: No. 5478. United States Circuit Court of Appeals for the Ninth Circuit. The Mutual Life Insurance Company of New York, a Corporation, Appellant, vs. Bertha E. Lipp, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the District of Oregon.

Filed April 30, 1928.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the District Court of the United States for the District of Oregon.

No. L.—10207.

April 16, 1928.

BERTHA E. LIPP,

Plaintiff,

vs.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, a Corporation,

Defendant.

ORDER UNDER SUBDIVISION 1 OF RULE 16 ENLARGING TIME TO AND INCLUDING APRIL 30, 1928, TO FILE RECORD AND DOCKET CAUSE.

Now at this day for good cause shown IT IS ORDERED that the time for filing the transcript

of record in this cause and docketing the same in the United States Circuit Court of Appeals for the Ninth Circuit be and the same is hereby extended to and including April 30, 1928.

JOHN N. McNARY,
Judge.

[Endorsed]: Order Under Subdivision 1 of Rule 16 Enlarging Time to and Including April 30, 1928, to File Record and Docket Cause. Filed Apr. 30, 1928. Paul P. O'Brien, Clerk. [58]

No. 5478

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,
Appellant,

vs.

BERTHA E. LIPP,
Appellee.

Appellant's Petition and Brief

To the Honorable the Judges of the Above Entitled Court:

The petition of the above named appellant respectfully recites:

(1) That this is an action brought on a policy of life insurance issued by appellant on the life of John A. Lipp. The policy is attached to the com-

plaint and is printed in full in the transcript of record, pages 7-31. The only substantial question at issue between the parties to the litigation is whether or not the insured John A. Lipp is dead.

(2) The District Court held that appellant was concluded on this subject by the judgment of the Circuit Court of the State of Oregon for Coos County in an action brought on another life insurance policy issued by appellant on the life of the said John A. Lipp. The record of this former judgment was admitted over the objection and exception of appellant as will appear from page 53 of the transcript of record. The evidence offered by appellant to show that John A. Lipp was still living was excluded by the court and an exception was reserved by appellant to the ruling of the court sustaining appellee's objection and excluding the said testimony. (Transcript of Record, 54-65.) The District Court thereupon instructed the jury as follows:

> "I will say, in the first instance, that as to the death of the deceased, that matter was formerly litigated between these parties, in an action commenced in Coos County, Oregon. In that action there was an issue raised upon the question as to whether the deceased, Lipp, died on the 31st day of January, 1924. That issue was determined in favor of the plaintiff, and, so far as this case is concerned, it is conclusive upon the parties to this action. So you will assume that the deceased died on that date, as set forth in the complaint."

(3) That appellant appealed from the judgment of the Circuit Court of the State of Oregon for Coos County. The said appeal was perfected, was duly heard by the Supreme Court of the State of Oregon, and on the 22nd of May, 1928, the Supreme Court of the State of Oregon handed down an opinion reversing the judgment of the Circuit Court for Coos County. That a copy of the opinion so handed down is hereto annexed, marked Exhibit "A" and made a part of this petition. The said opinion of the Supreme Court of Oregon is reported in 267 Pacific at page 519, and is found in the Advance Sheets of the Pacific Reporter bearing date June 25th, 1928.

(4) That subsequent thereto the mandate of the Supreme Court of the State of Oregon was duly entered in the journal of the Circuit Court for Coos County and a copy of the said order admitting the said mandate is hereto annexed marked Exhibit "B" and made a part of this petition.

(5) Appellant therefore avers that the sole foundation upon which the judgment rendered in the District Court of the United States for the District of Oregon in favor of appellee and against appellant on the 2nd of March, 1928, and from which this appellant has appealed, has been overturned and rendered of no force and effect.

WHEREFORE appellant prays that this court reverse the said judgment as of course.

ARGUMENT

The question of law presented by the foregoing petition has been before the Federal courts for consideration on several occasions.

Butler vs. Eaton, 141 U. S. 240; 35 L. Ed. 713, 714.

This was a decision rendered by Mr. Justice Bradley on a writ of error sued out to review the judgment of the Circuit Court of the United States for the District of Massachusetts. We quote from the opinion:

> "As the sole ground and reason for giving judgment against the receiver, in regard to the amount of the new shares of stock, was the judgment of the Supreme Judicial Court of Massachusetts, which (as stated) we have just reversed, the inquiry arises, What disposition may be made of the judgment in this case, supposing that the evidence of the Massachusetts judgment was properly admitted and allowed by the circuit court on the trial of the cause? At that time this judgment was valid and subsisting. It was not nominally between the same parties, it is true. It was a judgment recovered by Mary J. Eaton against the Pacific National Bank; whereas the present action is an action between Butler, the receiver of the said bank, and the said Mary J. Eaton. We are inclined to think, however, that the court below was right in determining that the two actions were substantially between the same parties, inasmuch as a receiver of a national bank, in all actions and suits growing out of the transactions of the bank, represents it as fully as an executor represents his testator. We think, therefore, that the evi-

dence of the judgment recovered was properly admitted as a bar to the receiver's title to recover in reference to the new stock. And it cannot be said, therefore, looking to the record in this case alone, that there is error in the judgment now before us. But by our own judgment just rendered in the other case, the whole basis and foundation of the defense in the present case, namely, the judgment of the Supreme Judicial Court of Massachusetts, is subverted and rendered null and void for the purpose of any such defense. Whilst in force, an execution issued upon it, and a sale of property under such execution would have been effective. And when it was given in evidence in this case it was effective for the purpose of a defense, but its effectiveness in that regard is now entirely annulled. Are we then bound to affirm the judgment and send it back for ulterior proceedings in the court below, or may we, having the judgment before us, and under our control for affirmance, reversal or modification, and having judicial knowledge of the total present insufficiency of the ground which supports it, set it aside as devoid of any legal basis, and give such judgment in the case as would and ought to be rendered upon a writ of error *coram vobis, audita querela,* or other proper proceedings for revoking a judgment which has become invalid from some extraneous matter?"

The court then proceeds to discuss the case of *Ballard vs. Searls,* 130 U. S. 50, 32 L. Ed. 846. The court concludes his opinion with the following language:

> "The present case is a more simple one. The judgment complained of is based directly upon the judgment of the Supreme Judicial Court of Massachusetts, which we have just reversed. It is apparent from an inspection of the record that the whole foundation of that part of the judgment which is in favor of the defendant is, to our judicial knowledge, without any validity, force or effect, and ought never to have existed. Why, then, should we not reverse the judgment which we know of record has become erroneous, and save the parties the delay and expense of taking ulterior proceedings in the court below to effect the same object?
>
> "Upon full consideration of the matter we have come to the conclusion that we may dispose of the case here. We therefore reverse the judgment of the Circuit Court, and order that the cause be remanded with directions to enter judgment for the plaintiff in error against the defendant in error for the whole amount sued for in the action, namely, eight thousand dollars, with interest and costs, and take such further proceedings as may be proper in conformity with this opinion."

The same question came before this court in the case of

Hennessy vs. Tacoma Smelting & Refining Co., 129 Fed. 40, 43-44.

The court speaking through Judge Gilbert said:

"One of the assignments of error is that the court held that the judgment of the state court in case No. 19,209 operated as a bar or as an adjudication of any of the matters involved in the present case. We need not enter into a consideration of the disputed questions involved on this assignment, further than to advert to the fact that, subsequent to the final decree rendered by the court below, the judgment so relied upon as an estoppel was reversed by the Supreme Court of the state of Washington. * * * *Hennessy vs. Tacoma S. & R. Co.,* 74 Pac. 584. It was held that the judgment of the superior court had been prematurely entered, and it was adjudged that the judgment be reversed, and the cause remanded to the superior court, with instructions to proceed with the trial on the issues joined. It has been held that the effect of a reversal of a judgment completely destroys its efficacy as an estoppel, and that an appellate court may take judicial notice on the appeal of such a reversal occurring after the date of the decision appealed from. *Butler vs. Eaton,* 141 U. S. 240, 11 Sup. Ct. 985, 35 L. Ed. 713. In that case the Supreme Court had before it for review on writ of error the judgment of the Circuit Court for the District of Massachusetts, in which it had been adjudged that a certain prior judgment of the Supreme Judicial Court of Massachusetts constituted an estoppel as to a portion of the amount sued for. After the date of the judgment

of the Circuit Court the decision of the Supreme Judicial Court of Massachusetts was, upon writ of error from the Supreme Court of the United States, reversed. The latter court, in deciding the case of Butler vs. Eaton, took judicial notice of that reversal, and said that, when the judgment so relied upon as an estoppel 'was given in evidence in this case, it was effective for the purpose of a defense, but its effectiveness in that regard is now entirely annulled. * * * The court therefore reversed the judgment of the Circuit Court, and remanded the cause, with directions to enter judgment for the plaintiff in error for the whole amount sued for in the action. On the authority of that case, we entertain no doubt that the decree of the lower court in the present case must be reversed."

The Circuit Court of Appeals for the Eighth Circuit has reached the same conclusion.

Ransom vs. City of Pierre, 101 Fed. 665, 670, 672.

"Assuming, in view of what has already been said, that the judgment in the mandamus suit was pleadable in bar, and determinative of the plaintiff's rights in the case now in hand so long as that judgment was unreversed, we are nevertheless confronted with the inquiry whether it should be given that effect when it is shown by a duly-certified copy of the opinion of the supreme court of South Dakota that the judgment in question has been vacated and annulled for error. As a general proposition, it is doubtless true that an appellate court is required to determine whether a judgment which is challenged by a writ of error is erroneous upon the facts disclosed by the record, and upon the facts as

they existed when the judgment was rendered. But, inasmuch as all rules of procedure are intended to secure the administration of justice in an orderly manner, it does not seem reasonable that a rule of procedure should be observed when it is apparent that a strict adherence thereto will work injustice. When an appellate court has the power to vacate a judgment rendered by a *nisi prius* court, over whose proceedings it exercises supervision and control, and its attention is called in an authentic manner to something that has transpired since the trial, which renders it inequitable to permit the judgment to be carried into effect, we think that it may lawfully exercise its power to annul the judgment and remit the record to the lower court for such further proceedings as may be necessary. It is essential, of course, that there should be a general observance of rules of procedure, but compliance with a particular rule ought not to be required when a literal compliance therewith would defeat, rather than promote, the ends of justice. As a general proposition, the rights of the parties to a suit are to be determined upon the facts as they exist when the action is commenced, or at least when the issues have been formulated by pleadings. Nevertheless, the common law has always permitted a defendant to take advantage of a defense growing out of what subsequently transpires by a plea *puis darrein* continuance. Andrews, Steph. Pl., Sec. 77; Chit. Pl. (16th Am. Ed.), pp. 689, 690. In the state of New York, where the doctrine prevails that the taking of an appeal from a judgment does not prevent the judgment from being pleaded in bar to another action between the same parties, it is held that if, after a judgment has been successfully pleaded in the second suit, it is reversed on appeal, the judgment in the second action

> may be set aside by the trial court for that reason, although no error was committed on the trial. *Parkhurst vs. Berdell,* 110 N. Y. 386, 392; 18 N. E. 123."

The court then proceeds to discuss certain other authorities and the reasons upon which the conclusions reached therein were based. The opinion concludes:

> "In view of what has been said, we conclude that we have the power and that it is our duty to reverse the judgment below, and remand the cause for a new trial. The judgment in the mandamus case has been reversed, and the cause remanded for a new trial, and, if this court makes a similar order, it will be optional with the plaintiff to prosecute either one of the suits and dismiss the other, and by so doing avoid further complications growing out of the pendency of suits upon the same cause of action in two courts of co-ordinate jurisdiction."

The foregoing principles also find support in

Ridge vs. Manker, 132 Fed. 599, 607.

2 Freeman on Judgments, 5th Ed., 721.

We have been able to find no federal authority in conflict with the doctrine announced in the foregoing cases and we think the matters and things hereinbefore set forth are sufficient to entitle us to a reversal of the judgment appealed from. We may

add that we are filing with this petition a certified copy of the order entering the mandate of the Supreme Court in the above case.

Respectfully submitted,

McCamant & Thompson,

Attorneys for Appellant.

EXHIBIT "A"

In the Supreme Court of the State of Oregon

Department No. 2

BERTHA E. LIPP,
Respondent,

vs.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, a Corporation,
Appellant.

Appeal from Coos County.
Hon. George F. Skipworth, Judge.
Argued and Submitted April 17, 1928.

Wm. T. Stoll (J. W. McInturff on Brief) for Respondent.

Wallace McCamant (McCamant & Thompson and Ralph H. King on Brief) for Appellant.

BELT, J.

Reversed and Remanded.

Filed May 22, 1928,
ARTHUR S. BENSON, Clerk.
By.....
Deputy.

BELT, J.

Plaintiff had verdict and judgment in an action on an insurance policy issued by the defendant company on the life of her husband. The sole issue in the trial court was whether the insured was dead. It was the contention of the plaintiff that her husband had drowned in the Columbia River, near Vancouver, Washington, on or about January 31, 1924. The defendant claimed that he was a fugitive from justice. There was testimony tending to support both theories. No motion for nonsuit or directed verdict was made challenging the sufficiency of the evidence. The plaintiff established a prima facie case and it was proper to submit her case to the jury.

This action was commenced about three years after the disappearance of John A. Lipp, the husband of plaintiff. The plaintiff and her son and daughter testified at the trial as to the facts and circumstances surrounding the disappearance of the alleged deceased. Depositions of the father, mother and sister of plaintiff's husband were also introduced in evidence, tending to show that if Lipp were alive he would probably return to his family. On July 10, 1925, plaintiff instituted a suit for divorce against Lipp charging him with desertion. On April 22, 1926, however, the suit was dismissed when, as she says, she was convinced, on account of the discovery of a skull in the river, that her husband was dead.

Over the objection of defendant, plaintiff, in response to the question, "What is the reputation in the family of John A. Lipp as to whether he is dead or alive?" was permitted to answer, "They all think that he is dead." She was also asked, "Do you know what the general reputation in the community in which John A. Lipp resided is as to whether or not he is dead or alive?" and in response answered, "It is that he is dead." It is contended that the admission of this testimony constitutes reversible error. It is well established that the admission of evidence of reputation as applied to questions of pedigree, marriages, births and deaths is an exception to the general rule rejecting hearsay evidence. It is an exception founded upon necessity. When the death is of such recent occurrence that it is susceptible of proof by living witnesses, there is no occasion to resort to hearsay testimony. In the instant case, members of the Lipp family submitted to the jury for its consideration all of the facts and circumstances within their knowledge from which a reasonable inference of Lipp's death could be drawn. The testimony relative to reputation in the family and community amounted, under the circumstances as disclosed by the record, to a substitution of the judgment of a witness for that of a juror. The vital point in the case was whether Lipp was dead or alive. It was prejudicial error to permit a witness thus to invade the province of the jury In *re Hurlburt's Estate,* 68 Vt. 366, 35 Atl. 77, 35 L. R. A. 794; *Metropol-*

itan Life Insurance Company vs. Lyons, 50 Ind. Ap. 534, 98 N. E. 824; *Denbo vs. Boyd,* 194 Mo. Ap. 121, 185 S. W. 236; *Stein vs. Bowman,* 10 L. Ed. 129; *Fidelity Mutual Life Insurance Company vs. Mettler,* 185 U. S. 308, 46 L. Ed. 922.

Counsel for plaintiff urges that the testimony relative to reputation of death in the family and community was introduced not to establish the fact of death, but for the purpose of showing good faith of plaintiff and to refute the charge of fraud. In this connection it is significant to note that, at the time the questions were asked concerning reputation in the family and community, plaintiff's good faith had not been put in issue, as the record of the divorce proceeding was introduced subsequent thereto. Reliance is had on *Fidelity Mutual Life Insurance Company vs. Mettler, supra,* which holds such evidence to be admissible not to prove death but to refute a charge of fraud. In the Mettler case it was the contention of the insurance company that the insured and his sister had entered into a conspiracy to defraud the company. Here there is no such contention, the defense being that Lipp is alive and a fugitive from justice. After a diligent search of the authorities we have found no case based on a similar state of facts which holds such evidence to be admissible. It is idle to argue that it was not prejudicial. It was directed to the vital point in the case.

As stated in *Pitts et al. vs. Crane,* 114 Or. 593, 236 P. 475:

> "When prejudicial error affirmatively appears on the face of the record, this court cannot presume that it is harmless."

We see no merit in other assignments of error, but, for reasons stated, we are obliged to reverse the judgment in favor of plaintiff and remand the cause for a new trial.

Rand, C. J., and Bean, and Coshow, J. J., concur.

EXHIBIT "B"

In the Circuit Court of the State of Oregon

for Coos County

BERTHA E. LIPP, *Plaintiff,* vs. THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, *Defendant.*	ORDER

This cause coming on to be heard on the application of the defendant for an order entering the mandate of the Supreme Court in the above entitled cause and the said mandate being presented in connection with said application and being in words and figures as follows, to-wit:

"BE IT REMEMBERED, That at a regular term of the Supreme Court of the State of Oregon, begun and held at the Supreme Court room in the City of Salem, on the first Monday of March, 1928.

On this Tuesday, the 22nd day of May, 1928, the

same being the 33rd judicial day of said term, there were present:

JOHN L. RAND, Chief Justice,
GEORGE ROSSMAN, Associate Justice,
OLIVER P. COSHOW, Associate Justice,
HARRY H. BELT, Associate Justice,
THOMAS A. McBRIDE, Associate Justice,
HENRY J. BEAN, Associate Justice,
GEORGE M. BROWN, Associate Justice,
ARTHUR S. BENSON, Clerk,

whereupon, among others, the following proceedings were had:

BERTHA E. LIPP, *Respondent,* vs. THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, a Corporation, *Appellant.*	*Department No. 2* *Appeal from Coos County,*

This cause on April 17, 1928, having been duly argued and submitted upon and concerning all questions arising upon the transcript and record and then reserved for further consideration, and the Court having fully considered all said questions as well as suggestions of counsel in their argument and briefs finds there is error as alleged.

It is therefore considered, ordered and adjudged that the judgment of the Court below in this cause rendered and entered be and the same is reversed and set aside.

It is further ordered that appellant recover of and from respondent its costs and disbursements in this court taxed at $379.27.

It is further ordered that this cause be remanded to the court below from which the appeal was taken with directions to grant a new trial and to enter a judgment in accordance herewith."

It is considered, ordered and adjudged that the said mandate be spread upon the journal of this court, and thereupon it is

CONSIDERED, ORDERED AND ADJUDGED that the defendant do have and recover of plaintiff the defendant's costs and disbursements on appeal taxed at Three Hundred Seventy-nine and 27/100 Dollars ($379.27) and that execution do issue therefor.

(Sd.) J. T. BRAND, Judge.

Dated June 27, 1928.

CLERK'S CERTIFICATE

State of Oregon, }
County of Coos, } ss.

I, ROBT. R. WATSON, County Clerk of Coos County, Oregon, and Ex-Officio Clerk of the Circuit Court for said County and State, do hereby certify that the foregoing and attached copy of ORDER ON MANDATE, in the case of Bertha E. Lipp vs. The Mutual Life Insurance Company of New York, Case No. 7626, has been by me compared with the original Order, entered June 27, 1928, in Circuit Court Journal No. 22, page . ., records of Coos County, Oregon, now on file and of record in my office and custody, and that it is a true, full and correct copy, and transcript therefrom and of the whole of such original Order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Circuit Court this 9th day of July, 1928.

(Sgd.) ROBERT R. WATSON, Clerk.

By.....
Deputy.

(SEAL)

BRIEF

STATEMENT OF FACTS

The litigation had in the Circuit Court of the State of Oregon for Coos County and in the District Court of the United States for the District of Oregon is based upon the disappearance of John A. Lipp on or about the 31st of January, 1924. At that time John A. Lipp had been employed by Dr. Otis B. Wight and Mr. Alma D. Katz of Portland, Oregon, to work upon the Waucomah Farm, a property owned by Dr. Wight and Mr. Katz and situate four miles below Vancouver, Washington, on the bank of the Columbia River. On the 31st of January, 1924, Dr. Wight and Mr. Katz ascertained that Mr. Lipp had executed a chattel mortgage covering the personal property on this farm as security for his individual note given the Vancouver National Bank of Vancouver, Washington. They asked Lipp to come to Vancouver and explain this transaction. Lipp left the farm, met a friend of his, Harry G. Smith by name, at the edge of Vancouver and Smith at Lipp's request drove Lipp across the Interstate Bridge and left him in the Kenton District of Portland.

Appellant has been unable to account for Lipp's movements at any time since then. Bertha E. Lipp, who is his wife, and who is the beneficiary under two policies of life insurance in the appellant company, has brought these actions claiming that the insured is dead and that she is entitled to recover.

As is stated in the foregoing petition she sued first in the Circuit Court of the State of Oregon for Coos County on the smaller of the two policies. The amount involved in this action was less than $3000 and there was no right of removal. The verdict of the jury was in favor of plaintiff and judgment was entered thereon. This judgment was the sole basis of recovery in the action brought in the Federal Court. After the trial of this cause in the United States District Court, the Supreme Court of Oregon reversed the judgment rendered in the Circuit Court of the State of Oregon for Coos County.

ERRORS RELIED UPON

The errors relied upon by appellant are found on pages 45-48 of the record. They are three in number:

(1) That the court erred in receiving in evidence the record of the judgment rendered by the Circuit Court for Coos County.

(2) That the court erred in excluding our testimony tending to show that John A. Lipp is still living.

(3) That the court erred in giving the following instruction:

> "I will say, in the first instance, that as to the death of the deceased, that matter was formerly litigated between these parties, in an action commenced in Coos County, Oregon. In

that action there was an issue raised upon the question as to whether the deceased, Lipp, died on the 31st day of January, 1924. That issue was determined in favor of the plaintiff, and, so far as this case is concerned, it is conclusive upon the parties to this action. So you will assume that the deceased died on that date, as set forth in the complaint."

These three assignments of error are all based on a single legal contention made by appellant. It is well settled under the laws of Oregon that an estoppel must be pleaded if it is to be relied upon, provided there is opportunity to plead the estoppel.

Couch vs. Scandinavian Bank, 103 Or. 48, 56.

Vogt vs. Marshall-Wells Hardware Co., 88 Or. 458, 464.

Gladstone Lumber Co. vs. Kelly, 64 Or. 163, 166.

This principle of law has been applied specifically to cases where the estoppel relied upon is the judgment of a court of record.

Larson vs. Larson, 103 Or. 393-395.
McCully vs. Heaverene, 82 Or. 650, 653.
Davis vs. Chamberlain, 51 Or. 304, 315.
Bays vs. Trulson, 25 Or. 109, 112.
Murray vs. Murray, 6 Or. 26, 29.

The decision of *Farmers Bank vs. Davis,* 93 Or. 655, 664, is out of harmony with the foregoing line of authority and it is our contention that it does not correctly state the law in Oregon on the above question.

The complaint of appellee found in the transcript of record on pages 3-6 does not plead the estoppel of the Coos County judgment and it was our contention in the lower court that for this reason the judgment roll was inadmissible and that the court erred in receiving it, in excluding appellant's testimony tending to show that John A. Lipp is still living, and especially in giving the jury the binding instruction above quoted.

For this reason as well as for the reasons set forth in the petition printed with this brief, we ask that the above cause be reversed.

Respectfully submitted,

McCamant & Thompson,

Attorneys for Appellant.

NO. 5478

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THE MUTUAL LIFE INSURANCE COMPANY
OF NEW YORK,
Appellant,

vs.

BERTHA E. LIPP,
Appellee.

Appellant's Reply Brief

The brief of appellee is built up almost wholly on the case of

Deposit Bank vs. Board of Councilmen, 191 U. S. 499, 48 L. Ed. 276.

We think the matter important enough to justify writing this reply brief for the purpose of giving the court our views as to what was decided in the above case.

The Deposit Bank case did not involve a direct attack upon a judgment which had been reversed on appeal. The question mooted and determined was the effect to be given to a decree which was erroneous but had become final.

In 1898 the Circuit Court of the United States for the District of Kentucky passed a decree adjudging that a contract had been entered into between the Deposit Bank and the State of Kentucky whereby the Bank was relieved of taxation on its property in consideration of the payment of certain sums prescribed by the Hewitt law. This decree in the United States Circuit Court was based wholly upon a judgment previously rendered in the State Court between the same parties. Thereafter this judgment in the State Court was reversed by the Kentucky Court of Appeals. Notwithstanding this reversal of the State Court judgment there was no direct attack made on this ground on the decree rendered in the United States Circuit Court. This decree of the United States Circuit Court was affirmed by the Supreme Court of the United States. The affirmance was based upon an even division of the judges in the United States Supreme Court and no opinion was rendered. See 174 U. S. 800, 43 L. Ed. 1187.

The foregoing was the history of the earlier litigation. At its termination the decree passed by the Circuit Court of the United States for the District of Kentucky was in full force and effect although

the opinion passed by the Kentucky Court of Appeals showed that this decree was erroneous.

The litigation determined by the case reported in 191 U. S. had its inception in an action brought by the Board of Councilmen of the City of Frankfort in the Circuit Court of Kentucky for Franklin County. They sued to collect a tax which the Bank contended was barred by the decree of the federal court in the earlier litigation. The Circuit Court for Franklin County ruled with the Bank and dismissed the petition filed by the Board of Councilmen. The Kentucky Court of Appeals reversed the judgment of dismissal and thereupon the Bank sued out a writ of error to the federal Supreme Court. This court in an opinion passed by Mr. Justice Day held that the effect to be given to the decree of the federal court presented a federal question. This question was decided in accordance with the Bank's contention, the court holding that so long as the decree of the Circuit Court of the United States for the District of Kentucky remained in full force and effect it was a bar to the action brought by the councilmen. Mr. Justice Day was mindful that a direct attack could be made upon this judgment. He qualified his opinion by the following language found on page 512 of the official report and page 281 of the report in Law Edition:

> "It is to be remembered that we are not dealing with the right of the parties to get relief

> from the original judgment by bill of review or other process in the Federal court in which it was rendered. There the court may reconsider and set aside or modify its judgment upon seasonable application. In every other forum the reasons for passing the decree are wholly immaterial and the subsequent reversal of the judgment upon which it is predicated can have no other effect than to authorize the party aggrieved to move in some proper proceeding, in the court of its rendition, to modify it or set it aside. It cannot be attacked collaterally, and in every other court must be given full force and effect, irrespective of the reasons upon which it is based. Cooley, Const. Lim. 7th Ed. 83, and cases cited."

Applying the language of Mr. Justice Day to the facts of the present case appellant urges that it could not attack appellee's judgment at the present time in the District Court because that Court has lost jurisdiction by the perfecting of our appeal.

Citizens Bank vs. Farwell, 56 Fed. 539.

Draper vs. Davis, 102 U. S. 370, 26 L. Ed. 121, 122.

Keyser vs. Farr, 105 U. S. 265, 26 L. Ed. 1025.

The correct practice for the purpose of directly attacking appellee's judgment is undoubtedly that set forth in

Butler vs. Eaton, 141 U. S. 240, 35 L. Ed. 713, 714;

Hennessy vs. Tacoma Smelting & Refining Co., 129 Fed. 40, 43-44,

and

Ransom vs. City of Pierre, 101 Fed. 665, 670, 672.

Summarizing the contention which we are making in this reply brief we have to say that in the case at bar we are directly attacking appellee's judgment. In Deposit Bank vs. Board of Councilmen the attack was a collateral attack which on familiar grounds could not prevail.

Respectfully submitted,

McCamant & Thompson,
Ralph H. King,
Attorneys for Appellant.

No. 5478

United States Circuit Court of Appeals
For the Ninth Circuit

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, a Corporation,

Appellant,

vs.

BERTHA E. LIPP,

Appellee.

Respondent's Answer and Reply to Appellant's Petition and Brief

Upon Appeal From the United States District Court for the District of Oregon

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No. 5478

United States Circuit Court of Appeals
For the Ninth Circuit

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, a Corporation,

Appellant,

vs.

BERTHA E. LIPP,

Appellee.

Respondent's Answer and Reply to Appellant's Petition and Brief

STATEMENT

(Note: Italics in quotations from authorities contained in this brief, unless otherwise indicated, are ours).

In appellant's petition at page 4, it is stated:

> "The only substantial question at issue between the parties to the litigation is whether or not the insured John A. Lipp is dead."

The record in this case does not justify that statement.

There were many other questions of fact in the case that were vital, failure to prove which, on the part of respondent, would have been fatal to her case, viz: The answer of appellant to respondent's complaint beginning at page 38 of the printed transcript of record, paragraph I, denies paragraph I of the complaint, that is, that respondent was a citizen and resident of Oregon. Paragraph IV of the answer denies that respondent was the relict of John A. Lipp. Paragraph V denies that the policy described in paragraph V of the complaint and which was the policy sued on, was issued by appellant. Paragraph VI denies paragraph VI of the complaint, that is, that Lipp paid all of the premiums on the policy. Paragraph VII denies that Lipp died as stated in paragraph VII of the complaint. Paragraph VIII denies each and every allegation contained in paragraph VIII of the complaint *that is making proofs of death.* The same is true of paragraphs IX, X and XI of the answer. All of these issues on the part of the plaintiff below had to be maintained and established by her,—otherwise she would have failed. Furthermore it appears in the Bill of Exceptions and also from paragraph VII of the complaint that the judgment of the Circuit Court of Coos County between these parties, wherein it was found that John A. Lipp died on January 31, 1924, *was not pleaded in the complaint* in this case as an estoppel, but was offered simply *as evidence of a fact in issue* between the parties (p. 53 printed transcript of record). The introduction of that judgment as evidence on the part of respondent was objected to upon the *ground that it had not been pleaded as an estoppel.* (p. 53 Tr.).

Upon the trial in the State Court appellant objected to the intoduction of testimony as to family and community repu-

tation of the death of John A. Lipp. That appears from the judgment of the Supreme Court reversing the case (p. 15 appellant's petition and brief). Upon the trial *in this Court appellant offered testimony of community reputation* and excepted to the Court's order refusing it, (See p. 57 Tr. testimony of E. M. Dietrich) where appellant offered to prove that that witness "knows the community reputation in the City of Vancouver as to whether John A. Lipp is dead or alive and that said community reputation is that John A. Lipp is alive." It made a similar offer by the testimony of William Thompson, (p. 58 Tr.) and made a similar offer by the testimony of Lewis Kadow (p. 59 Tr.) and excepted to the action of the Court in refusing it. At pages 46 and 47 of the transcript the refusal of the Court to admit the testimony of those witnesses is assigned as error in this case.

ARGUMENT

I.

Appellant founds and bases its right to the relief asked in its petition upon the authority of Butler vs. Eaton 141 U. S. 240, quoted extensively in its brief at pages 6 to 8 inclusive, while we deny that a correct understanding of that case warrants the relief sought in this case or justifies the interpretation put upon the case by appellant's counsel. If that case bears the interpretation put upon it by appellant's counsel, it is evident that the Supreme Court has reversed it in a later case, viz: Deposit Bank vs. Frankfort, 191 U. S. 510 as follows:

> "It is urged that the state judgment upon which the Federal decree of 1898 is based was afterward

reversed by the highest court of Kentucky, and, therefore, the foundation of the decree has been removed and the decree itself must fall. But is this argument sound? When a plea of res judicata is interposed based upon a former judgment between the parties, the question is not *what were the reasons upon which the judgment proceeded, but what was the judgment itself,* was it within the jurisdiction of the court, between the same parties, and is it still in force and effect. The doctrine of estoppel by judgment is founded upon the proposition that all controversies and contentions involved are set at rest by a judgment or decree lawfully rendered which in its terms embodied a settlement of the rights of the parties. It would undermine the foundation of the principle upon which it is based *if the court might inquire into and revise the reasons which led the court to make the judgment.* In such case, nothing would be set at rest by the decree; but the matter supposed to be finally adjudicated, and concerning which the parties had had their day in court, could be reopened and examined, and if the reasons stated were in the judgment of the court before which the estoppel is pleaded insufficient, a new judgment could be rendered because of these divergent views and the whole matter could be at large. In other words nothing would be settled, and the judgment, unreversed, instead of having the effect of forever settling the rights of the parties, would be but an idle ceremony. We are unable to find reason or authority supporting the proposition that because a judgment may have been given for wrong reasons *or has been subsequently reversed,* that it is any the less effective as an estoppel between the parties while in force. In Crescent City Live Stock Co. v Butchers' Union Slaughter House Co., 120 U. S. 141, the question of what effect should be given to a decision of a court of the United States as proof of probable cause in a suit for a prosecution which was

alleged to be malicious was before the court. *It appeared that the judgment relied upon had been subsequently reversed, and it was held that this made no difference unless it was shown that the judgment was obtained by means of fraud.* Mr. Justice Matthews, delivering the opinion of the court, said:

> " 'Its integrity, its validity, and its effect are complete in all respects between all parties in every suit and in every forum where it is legitimately produced as the foundation of an action, or of a defence, either by plea or in proof, as it would be in any other circumstances. While it remains in force, it determines the rights of the parties between themselves, and may be carried into execution in due course of law to its full extent, furnishing a complete protection to all who act in compliance with its mandate, and even after reversal it still remains, as in the case of every other judgment or decree in like circumstances, sufficient evidence in favor of the plaintiff who instituted the suit or action in which it is rendered, when sued for a malicious prosecution, that he had probable cause for his proceedings.'

"The precise question was before the Court of Appeals of New Cork in Parkhurst v. Berdell, 110 N. C. 386, in which case a judgment was relied upon as an estoppel in a suit between the same parties. The first suit settled certain matters in controversy in the second suit, and was given force and effect as an estoppel, *but was afterward reversed by the appellate court.* The second suit, in which it was relief upon, came before the Court of Appeals, and it was claimed that the reversal of the judgment in the first suit would avoid its force as an estoppel between the parties. The court said (p. 392):

> " 'If the *judgment roll was competent evidence* when received, its reception was not rendered erroneous by the subsequent reversal of the judgment. Notwithstanding its reversal, it continued in this action to have the same effect to which it was entitled when received in evidence. *The only relief a party against whom a judgment which has been subsequently reversed has thus been received in evidence can have, is to move on that fact in the court of original jurisdiction for a new trial and then the court can, in the exercise of its discretion, grant or refuse a new trial, as justice may require.'*
>
> "It is to be remembered that we are not dealing with the right of the parties to get relief from the original judgment by bill of review or other process in the Federal court in which it was rendered. There the court may reconsider and set aside or modify its judgment upon seasonable application. *In every other forum the reasons for passing the decree are wholly immaterial* and the subsequent reversal of judgment upon which it is predicated can have no other effect that to authorize the party aggrieved to move in some proper proceeding, *in the court of its rendition, to modify it or set it aside.* It cannot be attacked collaterally, and in every other court must be given full force and effect, irrespective of the reasons upon which it is based. Cooley on Cons. Limitations, 7th ed. 83 et seq., and cases cited."

The interpretation put upon Butler vs. Eaton by appellant's counsel is radically at variance with Deposit Bank vs. Frankfort, but the latter case can be harmonized with the former case, it seems to us, by the adoption of the following interpretation of Butler vs. Eaton:

The facts in Butler vs. Eaton briefly are: A case com-

menced in the State Court of Massachusetts went to judgment for the defendant. Being between the same parties, *it was pleaded in bar as an estoppel* in the case of Butler vs. Eaton and a judgment entered in that case for the defendant *based solely upon such estoppel.* The case in the State Court involving a Federal question found its way to the Supreme Court and at the same session of the Court came the case of Butler vs. Eaton. In the former case from the State Court the Supreme Court not only reversed the judgment, but held that it should never have been entered for the defendant, but that a judgment should have been entered for the plaintiff, and thereupon proceeded *to enter a final judgment for the plaintiff.* Then proceeding with the case of Butler vs. Eaton, an examination of the record found that its sole support was the judgment which they had reversed and which they state at page .....

> "It is apparent from an inspection of the record that the *whole foundation* of that part of the judgment which is in favor of the defendant is *to our judicial knowledge* without any validity force or effect *and ought never to have existed.*"

and they thereupon proceeded to reverse the judgment in Butler vs. Eaton and entered therein a final judgment for the plaintiff.

There is a very wide distinction between Butler vs. Eaton and the case at bar: First: As shown in Butler vs. Eaton the judgment of the State Court *was pleaded as an estoppel.* Paragraph VII of the complaint in this case alleges the death of Lipp and to *prove that fact we simply offered in evidence* a certified copy of the judgment entered between the same parties in the Circuit Court of Coos County. That stands upon

the same plane as any other *documentary evidence* offered to prove a fact in issue. Its verity, truth or falsity is, like any other evidence, to be determined at the time of its admission in evidence. If this Court may on this appeal investigate or question the verity of that piece of documentary evidence offered at the trial in support of a disputed question of fact, then it may by the same line of reasoning question the verity of any other testimony, oral or documentary evidence, given upon the trial. Suppose that it were now authentically shown by the certificate of the County Clerk of Coos County, custodian of the records, that the certified copy of the judgment offered on the trial of this cause in the District Court was fabricated or forged and that no such judgment had ever been entered, could this Court, upon this appeal, considering the state of the record, reverse the judgment for that reason? It is settled beyond question that the truth or falsity of testimony offered on trial of a cause, or the verity of documentary evidence, is to be determined upon the trial, and the fact that after judgment certain tesimony given on the trial is found to be false or perjured, or that documentary evidence offered was forged, is not sufficient to overturn the judgment either upon appeal or by direct suit for that purpose. Suppose that in this case instead of offering a certified copy of the judgment of the Coos County Court to prove the death of Lipp, we had proved it by the testimony of a witness named John Doe, and he had testified that he knew Lipp in his lifetime, that Lipp died in California on the date mentioned in the complaint, that he was present at his funeral and identified his corpse, and thereafter that John Doe had been indicted, tried and found guilty of perjury in giving that testimony, and a certified copy of that conviction brought here and presented to the Court for the purpose of obtaining a reversal, could the Court act on it?

It could not for the simple reason that the truth or falsity of that tesimony was determined at the trial. There is an unbroken line of authority, concurred in by the Supreme Court of the State of Oregon, that a judgment given on testimony that was perjured will not be set aside for that reason, except perhaps on motion for new trial in the Court entering the judgment.

Second: The other distinguishing feature between Butler vs. Eaton and the case at bar is that the judgment of the Supreme Court of Oregon reversing the Circuit Court of Coos County simply ordered that a new trial be had, while in Butler vs. Eaton there was a final judgment entered for the opposite party, thereby not only destroying the foundation upon which the entire judgment depended, but making it utterly impossible to ever restore or give any validity to the judgment which had been pleaded as an estoppel.

The case of Hennessey vs. Tacoma Smelting & Refining Co., 129 Federal and the case of Ransom vs. City of Pierre, 101 Federal, cited by appellant in its brief, pages 9-12, were rendered before the case of Deposit Bank vs. Frankfort supra, and as neither of those cases have the distinguishing features that the case at bar is shown to have, and they both following Butler vs. Eaton, must yield to Butler vs. Eaton as qualified by Deposit Bank v. Frankfort. Those cases control this Court regardless of any former decision of this Court.

That the practice of using the judgment obtained in the Circuit Court of Coos County merely as evidence of a fact instead of pleading it, is the approved practice in the courts of Oregon and elsewhere, is shown by the following from the case of Farmers & Fruit-Growers Bank vs. Davis 93 Ore. p. 664, pts. 4 and 5:

"The rule that an estoppel by judgment to be available must be pleaded does not apply whereas in the case at bar the judgment instead of being relied upon in bar of the action, is attempted to be introduced in evidence merely as conclusive of some particular fact formerly adjudicated. In such case, it need not be pleaded in order to make it conclusive. The rule is stated in Swank vs. St. Paul City Ry. Co. 61 Minn. 423 (63 N. W. 1088) as follows:

" 'A former judgment on the same cause of action, being a complete bar to a second action, must always be pleaded by way of defense: Bowe v. Minnesota Milk Co. 44 Minn. 460 (47 N. W. 151). But a former judgment is no bar to a second suit upon a different cause of action. It merely operates as conclusive evidence of the facts actually litigated in the first action, and upon the determination of which the finding or verdict therein was rendered, and need not be pleaded any more than any other evidence. In such a case it is proper for a party to plead his cause of action or defense in the ordinary form, leaving the judgment to be used in evidence to establish his general right.' "

In Krekeler v. Ritter 62 N. Y. 372, 374, the Court uses the following language:

"The record of the Superior Court was not offered or received in evidence in bar of the action, but merely *as evidence of the fact in issue.* Had it been offered as constituting a bar, or as an estoppel to the action, it would have been inadmissible, not having been pleaded as a defense. (Citations). But as evidence of a fact in issue it was competent although not pleaded like any other evidence, whether documentary or oral. A party is never required to disclose his evidence by his pleadings. The evidence was competent to disprove a material allegation of

> the complaint traversed by the answer. As evidence it was conclusive as an adjudication of the same fact, in an action between the same parties."
> "5. The complaint alleges that the plaintiff is the owner of the property in question and entitled to the possession thereof. We think it is sufficient without amendment. *It was not required to plead its evidence.*"

See also to the same effect 34 C. J. p. 1066, Sec. 1507.

An examination of appellant's brief at pages 24 to 26 inclusive shows that the only assignment of error that is argued and pressed here consists in the fact that we offered the judgment obtained in Coos County as evidence without pleading it, citing authorities in support of it.

The foregoing case, Farmers & Fruit-Growers Bank v. Davis and 34 C. J. p. 1066, Sec. 1507, are decisive of the questions assigned as error and argued by appellant at p. 24 et seq of its brief, i. e., errors (1), (2), (3).

II.

CHARACTER OF ORDER IN CASE OF REVERSAL

If the Court should conclude to reverse this case it will do so of course upon the grounds stated in the different decisions cited by appellant,—that is to say, for the sake of expediency and to prevent the expense and necessity of independent proceedings at law or equity; in other words, in the interest of justice. It will be evident to the Court that upon a re-trial in the Circuit Court of Coos Couny, if the judgment is for the plaintiff (respondent), it will be decisive of this case. If it is for the defendant (appellant) it will be equally decisive of this

case. To reverse this case means to re-try both cases again at a big expense to both parties. We suggest that if the Court concludes to reverse, that in the interests of justice the order here should be that all proceedings in this case be stayed and held in abeyance until the trial of the case in the Circuit Court of Coos County, and if, upon that trial, the judgment be for the plaintiff (respondent) that the judgment here be affirmed, and if the judgment there be for the defendant (appellant) that it be reversed.

In case of reversal here the question will arise as to costs. It cannot be reversed because of any error committed by respondent. There was no error in the court below. Causes intervening since the trial alone justifies the Court in reversing, and therefore we very earnestly insist that the costs of this appeal in the event of a reversal should be borne by appellant, and at the very outside that neither party should recover costs.

In Volume 297 Federal at page 585 (we have not the name of the case at hand as we write this brief) was a case by the C. C. A. decisive of what is here contended for. The Court there set aside the judgment of the trial court for the same reason that this Court will set aside this judgment, if it does so, and in doing so the Court taxed the costs to the appellant.

Respectfully submitted,

WM. T. STOLL,

J. W. McINTURFF,

H. F. McNITURFF,

Attorneys for Respondent.

No.

United States
Circuit Court of Appeals
For the Ninth Circuit.

GARY SWAN,

Appellant,

vs.

CONSOLIDATED WATER COMPANY OF POMONA, a corporation, G. A. LATHROP, C. W. ALLISON, C. M. LATHROP, FRANK LATHROP, W. H. JOHNSTON, JAMES LONEY, S. M. HASKELL, J. P STORRS, CLEFA BROWNRIGG, CARL C. BOYD, F. C. BALFOUR, LILLIAN B. PARRY, F. B. ROBINSON, trustee, HELEN B. SMITH and J. E. STILLWELL, G. A. LATHROP AND J. E. STILLWELL, as executors of the Estate of Mrs. Emily Grady Gridley,

Appellees.

Transcript of Record.

Upon Appeal from the United States District Court for the Southern District of California, Southern Division.

Parker, Stone & Baird Co., Law Printers, Los Angeles.

INDEX.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original record are printed literally in italic; and, likewise, cancelled matter appearing in the original record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

Names and Addresses of Attorneys.

For Appellant:

ROBERT E. AUSTIN, Esq.,

JOHN N. HELMICK, Esq.,

414 Stock Exchange Building,
Los Angeles, California.

For Appellees:

KEMPER CAMPBELL, Esq.,

1408 C. C. Chapman Building,
Los Angeles, California.

United States of America, ss.

To Consolidated Water Company of Pomona, a corporation, G. A. Lathrop, C. W. Allison, C. M. Lathrop, Frank Lathrop, W. H. Johnston and G. A. Lathrop, as executor of the estate of Mrs. Emily Brady Gridley, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, on the 30th day of April, A. D. 1928, pursuant to Notice of Appeal filed in the Clerk's Office of the District Court of the United States, in and for the Southern District of California, in that certain Case No. M 112 H, in which Gary H. Swan is plaintiff and Consolidated Water Company of Pomona and others are defendants, and you are required to show cause, if any there be, why the decree dismissing this cause in the said court above mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable EDWARD J. HENNING United States District Judge for the Southern District of California, this 2nd day of April, A. D. 1928, and of the Independence of the United States, the one hundred and fifty second.

Edward J. Henning
U. S. District Judge for the Southern District of California.

[Endorsed]: No. M 112 H In the United States Circuit Court of Appeals for the Ninth Circuit Gary H.

Swan vs. Consolidated Water Company of Pomona, etc., et al. Citation Received copy April 3, 1928, Kemper Campbell, S. Filed Apr. 3, 1928 R. S. Zimmerman, Clerk, by L. J. Cordes, Deputy Clerk.

IN THE DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

GARY H. SWAN, Plaintiff, vs. CONSOLIDATED WATER COMPANY OF POMONA, a corporation, G. A. LATHROP, C. W. ALLISON, C. M. LATHROP, FRANK LATHROP, W. H. JOHNSTON, JAMES LONEY, S. M. HASKELL, J. P. STORRS, CLEFA BROWNRIGG, CARL C. BOYD, F. C. BALFOUR, LILLIAN B. PARRY, F. B. ROBINSON, trustee, HELEN B. SMITH and J. E. STILLWELL, G. A. LATHROP AND J. E. STILLWELL, as executors of the Estate of Mrs. Emily Grady Gridley, Defendants.	IN EQUITY BILL OF COMPLAINT for DISSOLUTION OF CORPORATION AND FOR A RECEIVER.

The plaintiff, Gary H. Swan, for his cause of action herein, alleges:

I.

That plaintiff is now and has been for several years last past, a citizen of the State of Ohio; that the defendant, Consolidated Water Company of Pomona is a

corporation organized and existing under the laws of the State of California, with its office and principal place of business in the City of Los Angeles, California; that the defendants, G. A. Lathrop, C. W. Allison, C. M. Lathrop, Frank Lathrop, W. H. Johnston, James Loney, S. M. Haskell, J. P. Storrs, Clefa Brownrigg, Carl C. Boyd, F. C. Balfour, Lillian B. Parry, F. B. Robinson, trustee, Helen B. Smith and J. E. Stillwell, G. A. Lathrop and J. E. Stillwell, as executors of the Estate of Mrs. Emily Brady Gridley, are citizens of the State of California, and reside within the Southern District of the State of California, Southern Division, and own all of the capital stock of the Consolidated Water Company of Pomona, except that owned by plaintiff.

II.

That the amount and value of the property in controversy herein is in excess of the sum of Three Thousand (3,000.00) Dollars.

III.

That the Consolidated Water Company of Pomona is a corporation duly organized and existing under the laws of the State of California, organized in the year 1896, with an authorized capital stock of $500,000.00, divided into five thousand shares (5,000) of the par value of $100.00 each, and all of said stock was issued immediately thereafter, and ever since has been and now is outstanding.

IV.

That the plaintiff is now and has been for many years last past, the bonafide owner of sixty-five shares of the capital stock of said Consolidated Water Company of Pomona, standing in his name on the books of said

corporation, and each of said shares is worth more than one Hundred Twenty ($120.00) Dollars.

V.

That plaintiff and defendants are all of the stockholders of said corporation, as plaintiff is informed and believes, and plaintiff brings this action for his own benefit and the benefit of all other stockholders, who care to join therein, and on behalf of said corporation.

VI.

That said corporation was organized for the purpose as set forth at length in its articles of incorporation, of acquiring wells, pipe lines, flumes, ditches, water privileges, etc., etc., in the Counties of Los Angeles and San Bernardino, California, for the supplying of water for household, domestic, irrigation and other public and private purposes to the inhabitants of San Jose Township and vicinity, County of Los Angeles, State of California, and more particularly to the inhabitants of the City of Pomona.

VII.

That immediately after the organization of said corporation, it proceeded to acquire wells, pipe lines, flumes, ditches, water privileges, etc., etc., necessary and convenient for supplying the inhabitants of said San Jose Township and vicinity, and especially the inhabitants of said City of Pomona, with water for public and private purposes, and has since until about a year ago, so continued to acquire such necessary and convenient properties and has furnished water to the inhabitants of said San Jose Township and said City of Pomona until or about the 5th day of October, 1926.

VIII.

That the business of said corporation, as aforesaid, was prosperous and profitable and from a small investment of the incorporators and stockholders, the business and assets of the company increased until on said 5th day of October, 1926, the value of its wells, pipelines, flumes, ditches, water privileges, franchises, business and property employed in furnishing water as aforesaid was in excess of the sum of $800,000.00, and its annual net profit on said date, as plaintiff is informed and believes, was in excess of $50,000.00.

IX.

That said G. A. Lathrop now and for more than ten years last past, has had absolute control of said corporation and its affairs, through dummy directors and has used said corporation and its assets for his own purposes to the detriment of said corporation and the other stockholders. That said corporation has earned profits of more than $500,000.00 in excess of its losses and running expenses, but no dividends have ever been paid except two; one of 2%, and the other of 4%, aggregating $30,000.00; that the balance of the earnings of said corporation have been paid out to said Lathrop and his friends under guise of salaries and compensation for services rendered or accumulated in the hands of the corporation and used for the benefit of said Lathrop and his friends to the great detriment of this plaintiff and other stockholders.

X.

That for more than ten years last past, said Lathrop caused said corporation to pay him a salary of $400.00 per month, and to pay to Emily Brady Gridley a salary

of $250.00 per month; that the said Gridley did nothing whatever of value for said corporation and said Lathrop rendered it no service commensurate with the salary so paid. That prior to the 29th day of December, 1926, said Lathrop had diverted sums of money belonging to Consolidated Water Company of Pomona, aggregating $20,722.00, to the Pacific Land and Cattle Co., a corporation owned by said Lathrop, and members of his family, and on said 29th day of December, 1926, he caused the board of directors of the Consolidated Water Company of Pomona to vote to him said sum in cancellation of said indebtedness and on said date, he caused said board of directors to vote him the additional sum of about $2,500.00 to satisfy an overdraft of said Lathrop on the books of the company, and on said date, he caused a sum of about $1,500.00 to be voted to said Gridley to satisfy an overdraft on her account on the books of the company. Said amounts were credited to the accounts of said Lathrop, the Pacific Land and Cattle Company, and said Mrs. Gridley, and the obligations herein mentioned were thereby discharged. That neither said Lathrop nor Mrs. Gridley had rendered said corporation any services whatsoever to justify said payments.

XI.

That plaintiff is informed and believes that at many other times and in many other ways the assets of said corporation have been diverted by said Lathrop and asks that he be required to come into this Court and show what monies and property of said corporation he has diverted to his own use and to account therefor.

XII.

That plaintiff has not demanded of the officers of said corporation that they bring suit against said Lathrop for an accounting of the matters set out above, because of the fact that they are subservient to his will and would refuse to do so and such demand would be useless.

XIII.

That during the year 1926, plaintiff is informed and believes the directors of said corporation were G. A. Lathrop, president; C. W. Allison, secretary; C. M. Lathrop, Frank Lathrop and W. H. Johnston. Plaintiff is informed and believes and on such information and belief, alleges that the said G. A. Lathrop owns 2389½ shares of stock in said corporation; and is one of the executors of the Estate of Mrs. Emily Brady Gridley, which owns 2080 shares; C. W. Allison owns five shares; C. M. Lathrop one share; Frank Lathrop one share; and W. H. Johnston, one share. That the said C. W. Allison is the son-in-law of said G. A. Lathrop, C. M. Lathrop is the wife of said G. A. Lathrop; Frank Lathrop is the son of said G. A. Lathrop; and said W. H. Johnston, a clerk in the office of said corporation, holding one share of stock for qualifying purposes, for the use and benefit of said G. A. Lathrop. That none of said directors except G. A. Lathrop have any substantial interest in said corporation, but each of them holds office as the tool of said Lathrop and is subservient to his will and as director, takes such action as said Lathrop directs without any independent thought of his own for the welfare of said corporation.

XIV.

That on the 9th day of August, 1926, the said Board of Directors at the request and under the direction of said G. A. Lathrop and without any authorization therefor from the stockholders passed a resolution directing the officers of the corporation to sell the wells, pipelines, flumes, ditches, water privileges, franchises, business and property of said corporation employed and used in furnishing water to the inhabitants of San Jose Township and vicinity and to the inhabitants of the City of Pomona, to the City of Pomona, for about $831,000.00.

XV.

That on or about the 10th day of September, 1926, without any authority therefor from the stockholders of the Consolidated Water Company of Pomona, said G. A. Lathrop made application on behalf of said corporation to the Railroad Commission of the State of California, for authority to sell the water system, rights, plant, business and substantially all of the property of said corporation to the City of Pomona, California; said application in the files of said railroad is No. 131163, and is entitled, "In the matter of the Consolidated Water Company of Pomona, a corporation organized for the purpose of supplying the City of Pomona with domestic water making application to sell its water system to the City of Pomona and the City of Pomona joining in the application for the purpose of purchasing said system." That on the 5th day of October, 1926, said commission made its order permitting said sale.

XVI.

That on or about the 5th day of October, 1926, pursuant to said resolution, and in conformity with the said order of the Railroad the said G. A. Lathrop as

president, and said C. W. Allison as Secretary of said corporation, did execute and deliver Bills of Sale, and Conveyances on behalf of said corporation to the said City of Pomona, whereby said corporation transferred and conveyed to the City of Pomona all of its wells, pipe-lines, flumes, ditches, water privileges, franchises, business and property employed in furnishing water as aforesaid to the City of Pomona and vicinity, and the said City of Pomona immediately took possession thereof. That the said City paid the said Company therefor, approximately $831,000.00; that said transfer of said property and franchises necessarily included the profitable business of furnishing water to inhabitants aforesaid, and included all the working capital and assets of said corporation, whereby it carried on said water business. That there are no other water rights and privileges which said corporation can acquire by which it could furnish water to the inhabitants of said San Jose Township and vicinity and to the inhabitants of the City of Pomona, were it permitted to do so.

XVII.

That the aforesaid sale, transfer and conveyance of the business and working capital assets of said corporation was made by the said G. A. Lathrop through said Board of Directors and dominated and controlled by him as aforesaid, and no meeting of the stockholders was called or held to consider the sale and transfer of the working capital assets of the corporation as aforesaid, and said sale and transfer was made without notice to or consent of this plaintiff and other stockholders of said corporation.

XVIII.

That by the sale and the transfer of the water system franchises and business of said corporation, as aforesaid, it wound up and completed its business and its purpose was fulfilled, and there was then and is now, no reason for its continued existence and it should be dissolved and its assets distributed to its stockholders.

XIX.

That said corporation more than a year ago, paid its debts, wound up and completed its business and now has on hand in cash and securities, in excess of $650,000.00; that during all of said time, said corporation has been in condition to be dissolved and its assets distributed to its stockholders, but the said G. A. Lathrop has refused to bring about its dissolution or permitted it to be done.

XX.

That heretofore on July 28, 1927, plaintiff demanded of said Lathrop and the Consolidated Water Company of Pomona, and its board of directors that they immediately take such action as might be necessary to bring about the dissolution of said corporation, and the distribution of its assets among its stockholders, but they and each of them refused and neglected to do so, or to take any action relating thereto.

XXI.

That thereafter, on August 31, 1927, at the annual meeting of the stockholders of said Company, plaintiff offered a resolution directing the officers and directors of said corporation to take such action as might be necessary to bring about a dissolution of said corporation; that all stockholders present except said Lathrop and those under his control, and estate of Emily Brady

Gridley, voted in favor of said resolution. That said Lathrop was and is one of the executors of said estate which owns 2080 shares of the capital stock of said Company, and J. E. Stillwell was and is the other executor of said estate. That all of the legatees of said estate had requested said executors in writing to vote the stock of said estate in favor of said resolution, and the said Stillwell did so vote said stock, but the said Lathrop as executor, disregarding his duty as trustee and the welfare and wishes of the beneficiaries of said estate, and acting in his own interest, voted said stock against said resolution and thereby prevented the vote of said stock from being received or counted on said resolution and said resolution was lost.

XXII.

That at the stockholders meeting aforesaid, after the resolution aforesaid failed to carry, plaintiff offered a resolution directing the officers of said Corporation to call a meeting of the stockholders of said corporation to be held on October 19, 1927, to consider the matter of dissolving said corporation and distributing its assets. That said resolution carried and said meeting was called and was held on the 19th day of October, 1927, and at said meeting plaintiff again offered a resolution directing the officers and directors of said corporation to take such action as might be necessary to dissolve said corporation and distribute its assets among its stockholders. That all of the stockholders present or represented at said meeting, except said Lathrop, and the members of his family, and the said estate, voted for said resolution; that the estate of Emily Brady Gridley, then owned 2080 shares of the capital stock of said corporation, and all

of the legatees of said estate had requested the executors of said estate in writing to vote in favor of said resolution and J. E. Stillwell, co-executor with said Lathrop voted therefor; but said Lathrop disregarding his duty as trustee for said legatees and for the purpose of promoting his own personal interest, voted said stock against said resolution as executor, and voted all of the other stock which he or members of his family controlled against said resolution, and said resolution was thereby lost.

XXIII.

That said G. A. Lathrop for the purpose of promoting his own personal interest, and for the purpose of enabling himself to better use said corporation and its assets for his own purposes, has moved its principal place of business from the City of Pomona to the City of Los Angeles; has determined to change its name and to cause it to engage in other and different lines of business, and has, as plaintiff is informed and believes, loaned large amounts of the corporation's money to the Pacific Land and Cattle Co., a corporation, owned by said Lathrop and members of his family, and has otherwise loaned its funds to great advantage to himself.

XXIV.

That said Lathrop by reason of his mismanagement of said corporation, his diversion of its assets, his disregard of the rights and interests of those whose property and interests come under his control, is not a fit or proper person to have control of the property or interests of this plaintiff or of the other minority stockholders of said corporation, and unless this Court takes charge of said corporation and its assets, said Lathrop will

further divert them from their proper use to other and different uses and to his own purposes and this plaintiff will continue to be deprived of the use and benefit of his said property and will suffer a total loss thereof as will all the other minority stockholders.

XXV.

That plaintiff was a stockholder of said Consolidated Water Company of Pomona at the time of all of the transactions complained of herein, and was at all of said times a citizen of the State of Ohio; that this suit is not a collusive one to confer on this Court jurisdiction of a case of which it would not otherwise have cognizance.

WHEREFORE, plaintiff prays that said Lathrop be required to account in this Court for all of the funds and property of said corporation which have come into his hands or under his control; that pending said accounting and final hearing hereon, a receiver be appointed to take charge of said corporation, assemble and conserve its assets for the use and benefit of those entitled thereto, and upon final hearing make and enter its decree dissolving said corporation and distributing its assets and that such other and further relief be granted as to the Court may seem proper in the premises.

Robert E. Austin
John N. Helmick
Attorneys for Plaintiff.

STATE OF CALIFORNIA)
)SS
COUNTY OF LOS ANGELES)

ROBERT E. AUSTIN being first duly sworn, deposes and states: that he is the attorney for plaintiff in the above entitled action; that he verifies this complaint for and on behalf of plaintiff because the plaintiff is absent from this jurisdiction and because of the fact that affiant has knowledge of the matters set forth in the complaint herein. That the statements contained in the above and foregoing Bill of Complaint are true and correct.

Robert E. Austin

Subscribed and sworn to before me this 4th day of November, 1927.

Naomi Jenetzky
Notary Public.
[Seal]

[Endorsed]: Original. No. M 112 H In the District Court of the United States Southern District of California Southern Division Gary H. Swan, Plaintiff, vs. Consolidated Water Company of Pomona, etc., et al., Defendants. In Equity Bill of Complaint for Dissolution of Corporation and a Receiver Filed Nov. 7, 1927, R. S. Zimmerman, R. S. Zimmerman Clerk Robert E. Austin & John N. Helmick Attorneys for Plaintiff. 414 Stock Exchange Building, Los Angeles, California.

IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION

GARY H. SWAN, Plaintiff, vs. CONSOLIDATED WATER COMPANY OF POMONA, a corporation, G. A. LATHROP, C. W. ALLISON, C. M. LATHROP, FRANK LATHROP, W. H. JOHNSTON, JAMES LONEY, S. M. HASKELL, J. P. STORRS, CLEFA BROWNRIGG, CARL C. BOYD, F. C. BALFOUR, LILLIAN B. PARRY, F. B. ROBINSON, trustee, HELEN B. SMITH and J. E. STILLWELL, G. A. LATHROP AND J. E. STILLWELL, as executors of the Estate of Mrs. Emily Brady Gridley, Defendants.	In Equity No. M 112 H MOTION TO DISMISS

Come now CONSOLIDATED WATER COMPANY OF POMONA, a corporation, G. A. LATHROP, C. W. ALLISON, C. M. LATHROP, FRANK LATHROP, W. H. JOHNSTON and G. A. LATHROP, as executor of the estate of Mrs. Emily Brady Gridley, defendants in the above entitled action, and move the court to dismiss the bill of complaint filed therein upon the ground that there is insufficiency of fact to constitute a valid

cause of action in equity against said defendants, or any of them.

Kemper Campbell

Attorney for defendants, Consolidated Water Company of Pomona, a corporation, G. A. Lathrop, C. W. Allison, C. M. Lathrop, Frank Lathrop, W. H. Johnston, and G. A. Lathrop, as executor of the estate of Mrs Emily Brady Gridley.

[Endorsed]: In Equity No. M 112 H In the United States District Court Southern District of California, Southern Division. Gary H. Swan, Plaintiff, vs. Consolidated Water Company of Pomona, a corporation, et al., Defendants. Motion to Dismiss Received copy of the within motion this 25 day of Nov 1927 Robert Austin John N. Helmick atty for ptf Filed Nov. 25, 1927 R. S. Zimmerman, clerk by Edmund L. Smith, Deputy Clerk Kemper Campbell attorney at law 1408 Chapman Building Phone 63144 Los Angeles Attorney for within enumerated defendants

IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION

GARY H. SWAN, Plaintiff, vs. CONSOLIDATED WATER COMPANY OF POMONA, a corporation, G. A. LATHROP, C. W. ALLISON, C. M. LATHROP, FRANK LATHROP, W. H. JOHNSTON, JAMES LONEY, S. M. HASKELL, J. P. STORRS, CLEFA BROWNRIGG, CARL C. BOYD, F. C. BALFOUR, LILLIAN B. PARRY, F. B. ROBINSON, trustee, HELEN B. SMITH and J. E. STILLWELL, G. A. LATHROP and J. E. STILLWELL, as executors of the Estate of Mrs. Emily Brady Gridley, Defendants.	In Equity No. M 112 H DECREE DISMISSING SUIT ON DEFENDANTS' MOTION TO DISMISS

This cause came on to be argued at this term, and was argued by counsel and was thereupon submitted on briefs and upon consideration thereof it was on the 7th day of January, 1928, ordered, adjudged and decreed that the motion of defendants to dismiss the above action for want of jurisdiction and for insufficiency of fact to constitute a valid cause of action in equity be granted.

NOW THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that defendants' motion to dismiss be sustained, and that this cause be and

hereby is dismissed, and that defendants recover from plaintiff their costs herein expended.

Edward J. Henning
District Judge.

Approved as to form as provided in Rule 44:

Robert E Austin
John N Helmick
Attorneys for Plaintiff

Decree entered and recorded 3/3/28 R. S. Zimmerman, clerk. By Francis E. Cross, Deputy Clerk.

[Endorsed]: In Equity No. M-112-H In the United States District Court Southern District of California, Southern Division. Gary H. Swan, Plaintiff vs. Consolidated Water Company of Pomona, a corporation, et al, Defendants. Decree Dismissing Suit on Defendants' Motion to Dismiss. Filed, Mar 3-1928 R. S. Zimmerman, Clerk By Francis E Cross Deputy Clerk Kemper Campbell attorney at law Phone 63144 Los Angeles 1408 Chapman Building Attorney for Defendants

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IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION

GARY H. SWAN, Plaintiff, vs. CONSOLIDATED WATER COMPANY OF POMONA, etc., et al., Defendants.	)	In Equity No. M 112 H ASSIGNMENT OF ERRORS.

Comes now the plaintiff, Gary H. Swan, and assigns as errors in the decision of the District Court of the

United States, in and for the Southern District of California, Southern Division, the following, to-wit:

1st—Error of the said Court in sustaining the motion of defendants, G. A. Lathrop, et al., to dismiss plaintiff's bill of complaint.

2nd—Error of the Court in holding that said Court did not have jurisdiction of the cause set up in plaintiff's bill of complaint.

3rd—Error of said Court in holding that there was "insufficiency of fact to constitute a valid cause of action in equity", in said bill of complaint.

4th—Error of the said Court in rendering judgment and making and entering its decree "dismissing plaintiff's suit" upon the sustaining of said defendants' motion to dismiss.

WHEREFORE, the plaintiff, Gary H. Swan, prays that the decree of the District Court of the United States in and for the Southern District of California, Southern Division so rendered, be reversed, set aside and held for naught and that a decree be rendered in favor of plaintiff upon its bill of complaint in this cause.

Robert E. Austin
John N. Helmick
Attorneys for Plaintiff.

[Endorsed]: Original. No. M 112 H In Equity In the District Court of the United States Southern District of California, Southern Division. Gary H. Swan, plaintiff, vs. Consolidated Water Company of Pomona, etc., et al. defendants. Assignment of Errors. Filed Apr. 2, 1928. R. S. Zimmerman, R. S. Zimmerman Clerk. Robert E. Austin & John N. Helmick attorneys for plaintiff, 414 Stock Exchange Building, Los Angeles, California

IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION

GARY H. SWAN, Plaintiff, vs. CONSOLIDATED WATER COMPANY OF POMONA, a corporation, et al., Defendants.	)	In Equity No. M 112 H NOTICE OF APPEAL

To Consolidated Water Company of Pomona, a corporation;

To G. A. Lathrop;

To C. W. Allison;

To C. M. Lathrop;

To Frank Lathrop;

To W. H. Johnston;

To G. A. Lathrop, defendants herein, and

To Kemper Campbell, their attorney, and

To James Loney;

To S. M. Haskell;

To J. P. Storrs;

To Clefa Brownrigg;

To Carl C. Boyd;

To F. C. Balfour;

To Lillian B. Parry;

To F. B. Robinson, trustee;

To Helen B. Smith and J. E. Stillwell; defendants;

YOU AND each of you will please take notice that the plaintiff, Gary H. Swan hereby appeals from that certain decree heretofore made, filed and entered herein, on the 3rd day of March, 1928, and from the whole thereof, to the Circuit Court of Appeals.

Dated March 7, 1928.

Robert E. Austin
John N. Helmick
Attorneys for Plaintiff.

[Endorsed]: No. M. 112 H. In the District Court of the United States, Southern District of California, Southern Division. Gary H. Swan, plaintiff vs. Consolidated Water Company of Pomona, etc., et al., defendants. Notice of Appeal. Received copy of the within notice this 7th day of March, 1928. J. P. Storrs, defendant. Received copy of the within notice this 7th day of March 1928. Helen B. Smith, defendant. Received copy of the within notice this 9th day of March, 1928. Kemper Campbell, attorneys for defendants—G. A. Lathrop, C. W. Allison, C. M. Lathrop, Frank Lathrop, W. H. Johnson and G. A. Lathrop. F. B. Robinson, Trustee. Filed Mar. 10, 1928. R. S. Zimmerman, Clerk by L. J. Cordes, Deputy Clerk. Robert E. Austin & John N. Helmick attorneys for plaintiff. 414 Stock Exchange Building, Los Angeles, California.

IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION.

GARY H. SWAN, Plaintiff, vs. CONSOLIDATED WATER COMPANY OF POMONA, etc., et al., Defendants.	In Equity No. M 112 H ORDER FIXING THE BOND ON APPEAL.

WHEREAS, the Court has heretofore made and filed its decree in this cause dismissing plaintiff's bill of complaint, and

WHEREAS, said plaintiff is dissatisfied with the said decree and has appealed therefrom and has requested this Court to make its order fixing the amount of the Bond on Appeal herein, and it appearing to be a proper case therefor,

IT IS THEREFORE ORDERED that the amount of plaintiff's bond on appeal in this cause be and the same is hereby fixed at the sum of $250.00.

Dated April 2nd, 1928.

Edward J. Henning
JUDGE.

[Endorsed]: Original. No. M 112 H In Equity. In the District Court of the United States Southern District of California, Southern Division. Gary H. Swan, plaintiff, vs. Consolidated Water Company of Pomona, etc., et al. defendants. Order Fixing Bond on Appeal. Filed Apr. 2, 1928. R. S. Zimmerman, R. S. Zimmerman Clerk Robert E Austin & John N. Helmick, attorneys for plaintiff, 414 Stock Exchange Building, Los Angeles, California.

IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION

GARY SWAN, Plaintiff,	)	
vs.	)	In EQUITY
CONSOLIDATED WATER COMPANY OF POMONA, etc. et al., Defendants.	)	No. M-112-H BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS, That I, GARY H. SWAN as principal, and the UNION INDEMNITY COMPANY, a corporation, as surety, are held and firmly bound unto the defendants and respondents, Consolidated Water Company of Pomona, a corporation, G. A. Lathrop, C. W. Allison, C. M. Lathrop, Frank Lathrop, W. H. Johnston and G. A. Lathrop, as executors of the Estate of Mrs. Emily Brady Gridley, in the penal sum of Two Hundred Fifty ($250.00) Dollars to be paid to said defendants, their heirs, successors, administrators or assigns, the payment of which well and truly to be made, we bind ourselves, our heirs, administrators and executors jointly and severally by these presents.

The conditions of the above and foregoing Undertaking, are that,

WHEREAS, the plaintiff in the above entitled cause has appealed from the decision and decree of the Court rendered therein, and has asked the said Court to fix the amount of his Undertaking on Appeal, and

WHEREAS, said Court has fixed the amount of said Undertaking at Two Hundred Fifty ($250.00) Dollars as aforesaid.

NOW, THEREFORE, in consideration of the foregoing and of said Appeal, we, the said GARY H. SWAN, Plaintiff, and UNION INDEMNITY COMPANY, Surety, are held and firmly bound unto the defendants and respondents, Consolidated Water Company, a corporation, G. A. Lathrop, C. W. Allison, C. M. Lathrop, Frank Lathrop, W. H. Johnston and G. A. Lathrop, as executors of the Estate of Mrs. Emily Brady Gridley, in the penal sum of Two Hundred and Fifty ($250.00) Dollars, lawful money of the United States, well and truly to be paid.

The conditions of this obligation are, that if the said plaintiff shall well and truly pay to said defendants all proper costs and expenses which may be incurred by reason of said Appeal, and taxed as costs in connection therewith in event the order or decree appealed from is sustained or in event the appeal is dismissed, then and in that event, this Undertaking shall be null and void; otherwise to remain in full force and effect.

IN WITNESS WHEREOF, the principal and surety have hereunto set their hands the 3rd day of April, 1928.

GARY H. SWAN, Principal
BY Robert E. Austin, His
Attorney.
UNION INDEMNITY COMPANY,
[Seal] Surety.
BY B. S. FRENCH
Its Attorney in fact.

STATE OF CALIFORNIA)
)SS.
COUNTY OF LOS ANGELES)

On this 3rd day of April, in the year one thousand nine hundred and 28, before me, MATT T. MANCHA, a Notary Public in and for said County and State, residing therein, duly commissioned and sworn, personally appeared B. S. FRENCH, known to me to be the duly authorized Attorney-in-fact of the UNION INDEMNITY COMPANY, and the same person whose name is subscribed to the within instrument as the Attorney-in-fact of said Company, and the said B. S. FRENCH duly acknowledged to me that he subscribed the name of the UNION INDEMNITY COMPANY thereto as Principal and his own name as Attorney-in-fact.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this Certificate first above written.

Matt T. Mancha

[Seal] Notary Public in and for LOS ANGELES County, STATE OF CALIFORNIA

Examined and recommended for approval as provided in Rule 29.

Robert E. Austin
Attorney.

[Endorsed]: Original In Equity No. M 112 H In the District Court of the United States Southern District of California Southern Division Gary H. Swan, Plaintiff, vs. Consolidated Water Company of Pomona, etc. et al., Defendants. Bond on Appeal, Filed Apr. 3, 1928. R. S. Zimmerman, Clerk. By L. J. Cordes, Deputy Clerk. Robert E. Austin & John N. Helmick Attorneys for Plaintiff, 414 Stock Exchange Building, Los Angeles, California.

UNITED STATES OF AMERICA
District Court of the United States
Southern District of California

GARY H. SWAN VS. CONSOLIDATED WATER COMPANY OF POMONA, etc., et al.	CLERK'S OFFICE No. M 112 H PRAECIPE

TO THE CLERK OF SAID COURT:

Sir:

Please issue for use as a record on Appeal in this cause certified copy of the Bill of Complaint, Motion to dismiss by the Consolidated Water Company of Pomona and others, the Decree entered herein on the 3rd day of March, and the plaintiff's Notice of Appeal, Order fixing Bond on Appeal, Bond on Appeal, Assignment of Errors, Citation and of this Praecipe.

Robert E. Austin
John N. Helmick
Attorneys for Plaintiff.

[Endorsed]: No. M 112 H U. S. District Court Southern District of California Gary H. Swan vs. Consolidated Water Company of Pomona, etc., et al. Praecipe Received copy of the within Praecipe this 3rd day of April, 1928. Kemper Campbell. Filed Apr. 3, 1928 R. S. Zimmerman Clerk. By L. J. Cordes Deputy Clerk.

IN THE DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

GARY H. SWAN, Plaintiff, vs. CONSOLIDATED WATER COMPANY OF POMONA, etc., et al., Defendants.	)	In Equity No. M 112 H CLERK'S CERTIFICATE.

I, R. S. ZIMMERMAN, Clerk of the United States District Court for the Southern District of California, do hereby certify the foregoing volume containing 27 pages, numbered from 1 to 27 inclusive, to be the Transcript of Record on Appeal in the above entitled cause, as printed by the appellant, and presented to me for comparison and certification, and that the same has been compared and corrected by me and contains a full, true and correct copy of the citation, bill of complaint, motion to dismiss, decree dismissing suit, assignment of errors, notice of appeal, order fixing bond, bond on appeal, and praecipe.

I DO FURTHER CERTIFY that the fees of the Clerk for comparing, correcting and certifying the foregoing Record on Appeal amount to.....and that said amount has been paid me by the appellant herein.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of the District Court of the United States of America, in and for the Southern District of California, Southern Division, this.....day of....., in the year of Our Lord One Thousand Nine Hundred and Twenty-eight, and of our Independence the One Hundred and Fifty-second.

R. S. ZIMMERMAN,
Clerk of the District Court of the United States of America, in and for the Southern District of California.

By

Deputy.

No.

United States
Circuit Court of Appeals
For the Ninth Circuit.

GARY SWAN,

Appellant,

vs.

CONSOLIDATED WATER COMPANY OF POMONA, a corporation, G. A. LATHROP, C. W. ALLISON, C. M. LATHROP, FRANK LATHROP, W. H. JOHNSTON, JAMES LONEY, S. M. HASKELL, J. P STORRS, CLEFA BROWNRIGG, CARL C. BOYD, F. C. BALFOUR, LILLIAN B. PARRY, F. B. ROBINSON, trustee, HELEN B. SMITH and J. E. STILLWELL, G. A. LATHROP AND J. E. STILLWELL, as executors of the Estate of Mrs. Emily Grady Gridley,

Appellees.

SUPPLEMENT TO
Transcript of Record.

Upon Appeal from the United States District Court for the Southern District of California, Southern Division.

Parker, Stone & Baird Co., Law Printers, Los Angeles.

INDEX.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original record are printed literally in italic; and, likewise, cancelled matter appearing in the original record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

Names and Addresses of Attorneys.

For Appellant:

ROBERT E. AUSTIN, Esq.,
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Los Angeles, California.

For Appellees:

KEMPER CAMPBELL, Esq.,
1408 C. C. Chapman Building,
Los Angeles, California.

(Testimony of J. E. Stillwell.)

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

HON. EDWARD J. HENNING, JUDGE PRESIDING.

GARY H. SWAN, Plaintiff,	)	
-v-	)	
CONSOLIDATED WATER COMPANY OF POMONA, etc., et al., Defendants.	)	No. M-112-H

REPORTER'S TRANSCRIPT OF TESTIMONY AND PROCEEDINGS ON ORDER TO SHOW CAUSE.

LOS ANGELES, CALIFORNIA, MONDAY, DECEMBER 5, 1927. 2:00 P. M.

J. E. STILLWELL,

being first duly sworn, testified as follows:—

DIRECT EXAMINATION

BY MR. CAMPBELL:

Q Mr. Stillwell, what is your business or occupation?

A I am running a cafeteria.

Q And you were an attorney by profession, originally?

A Yes, sir.

Q You are one of the co-executors of the estate of Emily Brady Gridley, deceased?

A Yes.

(Testimony of J. E. Stillwell.)

Q Along with Mr. G. A. Lathrop, a defendant in this suit?

A Yes, sir.

Q You have a brother-in-law who is one of the legatees under the will of Mrs. Gridley?

A My wife's brother-in-law, yes, sir.

Q Was your brother-in-law interested in disposing of his stock in the water company or getting the money out of the company?

A I don't know as I quite understand your question.

(Question read.)

A Well, after the company had sold its water plant, and so forth, he thought he ought to have his share as soon as the estate was distributed. He was merely a legatee, and the stock had not yet been distributed, and he thought he ought to have his share of the money.

Q He told you about that?

A Yes, sir, he wrote me a letter.

Q And did you advise him that it was impossible to disincorporate and dissolve the corporation so that he could get his money out of it?

A I believe no. I did write and ask him to join in with Mr. Swan, or join in with the others in this matter, to assist in bringing it about.

Q How did you first get in touch with Mr. Swan, Mr. Stillwell?

A I was at Pomona, and I called on the City Attorney in behalf of the legatees of the estate, and asked him by what right the city thought they were buying the water company without a vote of the stockholders. He was City Attorney, and I thought, inasmuch as the

(Testimony of J. E. Stillwell.)

company was selling out to the city, it was a stockholders' proposition, as I understood it, and I went to see Mr. Allard, the City Attorney, and introduced myself as one of the co-executors and told him that the legatees would like to have their money, and Mr. Allard told me—he says, "I have a client who will be *might* glad to join in on that thing," and he looked up his books and gave me the address of G. H. Swan, Geneva, Ohio.

Q Whom were you representing in talking with Mr. Allard?

A I was representing the Gridley estate.

Q Was the estate interested in dissolving the corporation?

A It surely is, in getting the money to pay its legacies.

Q Under the terms of that will these legacies were of stock, and not money, were they not?

A Yes, sir.

Q Then, so far as the estate was concerned, it had no interest in whether they got the stock or the money, did it?

A After the money was subject to execution, I thought they were interested in getting the money.

Q There is money in the assets of the estate to pay all the cash legacies of the estate, is there not?

A I can't give you the figures. Mr. Lathrop could tell you about that.

Q These legacies were specific legacies of this stock, weren't they?

A Yes, sir.

(Testimony of J. E. Stillwell.)

Q And all you had to do was to distribute the stock, isn't that a fact?

A Yes.

Q Did you write some letters to the various legatees under this will and ask them if they would be interested in joining in a proceeding to get the corporation dissolved and get money for their stock?

A I did.

Q Did you suggest to them that an attorney be employed for that purpose?

A I did, I think.

Q Did you write similar letters to the stockholders of the corporation?

A I believe Mr. Swan is the only stockholder I wrote to—no, I wrote to Mr. Harry, I believe, at Fullerton.

Q And the other stockholders you interviewed personally?

A Yes, I believe so.

Q Did you interview the other stockholders before you interviewed Mr. Swan?

A Mr. Swan employed Mr. Austin before anyone else was approached on that subject.

Q Did you represent to Mr. Swan that you were going to secure the co-operation of all of the stockholders?

A That was last summer, and I do not have in mind just what I wrote, but I believe I gave him to understand that there would probably be a movement to compel the distribution of this money.

Q In which other stockholders would join?

(Testimony of J. E. Stillwell.)

A Perhaps. I haven't seen the letter since it was written. Probably in June or July. I do not remember just what I wrote.

Q Do you mean to intimate to this Court that you suggested to Mr. Swan that he should employ an attorney at his own expense and finance this suit for dissolution of this corporation?

A I wrote to Mr. Swan and told him that Mr. Austin would take the proposition on a contingent fee, if he wished to join, and he wired back that he would like to do so.

Q And you told him in that letter, did you not, that there was a movement on to get all of the legatees and some of the stockholders to join in the suit for dissolution, to liquidate the assets and divide them?

A No, sir; there hadn't been a legatee approached on the subject, or a stockholder, at that time.

Q Didn't you tell him there would be?

A I thought it was part of my duty to protect the interests of these legatees and have the money distributed. They had written me that they wanted it. If you had notified me, Mr. Campbell, I would have brought you some letters to show these things.

Q Did you make any statement to Mr. Swan indicating that he was to institute this suit at your instigation, and was to pay the cost of it, on a contingent basis, himself, without the aid of anybody else?

A I would rather get my letter and submit it to the Court.

Q Don't you remember that? Don't you remember whether or not you had an arrangement with Mr. Swan

(Testimony of J. E. Stillwell.)

that he was to be the sole plaintiff here in this behalf, and pay for this suit? Do you want the Court to believe you don't remember?

A It was our suggestion that the suit be brought in Mr. Swan's name.

Q That wasn't what I asked you. Did you have an arrangement with Mr. Swan, or did you suggest to Mr. Swan, that he was to institute this suit at his expense, hiring Mr. Austin on a contingent basis, and paying the whole fee? Was that it?

A No, sir.

Q Tell the Court what you did tell him, as near as you can remember it.

A If the Court please, I would rather have just what I wrote to Mr. Swan. If he had given me notice, I would have produced a copy of my letter.

THE COURT: Well, tell what you remember.

A My recollection is that the conversation—the conversation I had with Mr. Allard at Pomona, that I would be pleased to get this money distributed, and that I had talked to Mr. Austin, and Mr. Austin proposed that he would take up the case on a contingent fee, and I think that was about the substance of my letter.

Q BY MR. CAMPBELL: Now, Mr. Swan only had 50 shares of stock?

A 65.

Q 65 shares of stock, out of 500?

A 5000.

Q 65 shares of stock out of 5000?

A Yes, sir.

Q Was your wife's brother-in-law interested in this matter?

(Testimony of J. E. Stillwell.)

A He knew nothing about it.

Q Why didn't you represent him?

A I was representing him as executor, and all the others.

Q Well, he would have his stock soon enough, wouldn't he?

A He hasn't got it yet.

Q Due him under distribution?

A It is not distributed yet.

Q When it was distributed, you could have represented him?

A He is a non-resident; he lives in Wyoming.

Q After you secured Swan as a party, you then circularized other legatees, and you went to see other stockholders personally, did you not?

A Yes, I did.

Q That was the arrangement with Mr. Austin, was it not, that you would do so?

A It was supposed that Mr. Swan and the other stockholders would be interested in having this money, and I supposed that, as executor, I would represent the legatees. I had no notion of making any agreement with the legatees whatever.

Q But you soon had the notion of making arrangements with the legatees, and you corraled all those men for Mr. Austin on a contingent basis?

MR. AUSTIN: We object to this as immaterial, if your Honor please.

Q BY MR. CAMPBELL: How about these stockholders, Mr. Stillwell?

A What about them?

(Testimony of J. E. Stillwell.)

Q Wasn't it understood between you and Mr. Austin that you would use your good offices with these stockholders and have them join in this suit, upon the same basis?

A I think I told them Mr. Swan had employed Mr. Austin, and would like to have them join in too, would like to have them take up the matter.

Q Didn't you suggest when this matter was instituted that you would go to these other stockholders and get them to join?

A I had no notion of it until Mr. Allard suggested that Mr. Swan had held that stock for years, and received no dividends, and wanted his money very badly, and wanted to take some action, and then I wrote to Mr. Swan.

Q Wasn't there any other stockholder you had communicated with at all?

A Not at that time. I hadn't thought of approaching them. I thought Mr. Lathrop and the Gridley Estate owned all the property.

Q But you did have a talk with these other stockholders later?

A After Mr. Swan had employed Mr. Austin.

Q And in your letter to Mr. Swan you indicated to him that there would be an endeavor to have others join in this proceeding?

A I have given you my recollection. I can produce the letter, or a copy.

Q Are you willing to testify that there was no such intimation to Mr. Swan?

A I have given you the best recollection I could of the subject. Do you wish me to go over it again?

(Testimony of J. E. Stillwell.)

Q Yes?

A Just repeat the question, please.

(Question read.)

Q (Continuing) No such intimation to Mr. Swan, that no one else was going to help him out in this suit or be associated with him?

MR. AUSTIN: If the Court please, we submit that that has been covered by the examination, and it is not material anyway.

THE COURT: Well, he may repeat or summarize it.

A At that time I was rather expecting—I thought it was my duty to take such action as might be necessary on behalf of the legatees to distribute this money, and when Mr. Allard insisted that Mr. Swan would like to join in with it, he gave me his address and I wrote to him.

Q You are an attorney, aren't you?

A Well, I used to think I was.

Q You were never advised by counsel that an executor of an estate who had sworn to administer the provisions of a will, which provides for the distribution of certain stock, is under any obligation to instigate a suit for the dissolution of a corporation and the liquidation of its assets? You were never so advised, were you?

MR. AUSTIN: We object to that as calling for matters of hearsay and conversation with other people that isn't material. The question of his rights is a question of law, and any opinion he may have had of his own wouldn't really count in any way.

MR. CAMPBELL: He is defending himself for instigating this suit, on the ground that he felt that he thought it was his duty as an executor.

(Testimony of J. E. Stillwell.)

MR. AUSTIN: We object to any further testimony on this matter, on the ground that he is not on trial here today. The question is whether or not the complaint states a cause of action sufficient to give this "jurisdiction." We object to the further examination, on that ground.

MR. CAMPBELL: The Court has a right to investigate the question of jurisdiction when it is passing upon a matter of diversity of citizenship, when it appears that this witness, apparently out of some false conception of his duty, as he explains it—which I very much doubt—as an executor of some estate, writes to a stranger he never heard of and induces him to become the plaintiff, and then goes around to get others to become defendants, and they all show up here represented by the same lawyer; then it seems to me that it is plain upon the face of it, and out of the works of this very witness, that this Court has no jurisdiction of this suit.

THE COURT: Well, he has, I think, answered the question. It wouldn't make any particular difference, would it, whether he had been advised that it was his duty. He says his only interest was to get the cash for legatees who were, as a matter of law, entitled to the stock, and of course whether he was advised he had any such legal duty or not wouldn't make any difference, would it? As a matter of law, his business was to distribute the stock.

Q BY MR. CAMPBELL: Now, did you secure these other parties as clients for Mr. Austin?

A Yes, sir.

MR. AUSTIN: We object as immaterial, if the Court please.

(Testimony of J. E. Stillwell.)

THE COURT: Well, he answered the question.

Q BY MR. CAMPBELL: They were secured on the same basis of a contingent fee?

MR. AUSTIN: We object to that, if the Court please, as not material.

THE COURT: Well, he may answer, if he knows.

A Yes, sir.

Q BY MR. CAMPBELL: All on the same basis?

A Yes, sir.

Q Have you an interest in that fee?

A I expect to be paid for my services. I am a stockholder in the company.

MR. CAMPBELL: That is all.

CROSS-EXAMINATION

BY MR. AUSTIN:

Q Did you ever suggest to Mr. Swan in any of your correspondence with him that type of an action should be brought to bring about a dissolution of this corporation?

A No, sir.

Q Did you ever suggest to him whether the employment of an attorney would involve litigation or not?

A I am not sure.

Q Isn't it a fact that you simply suggested to him that he should employ an attorney, that it was possible a dissolution of the corporation might be brought about, and that nothing was said in your correspondence about what the means to be employed were, or what the relations of the parties might be?

A It was just simply to employ Mr. Austin to look after his interests.

(Testimony of J. E. Stillwell.)

Q In any conversation you had with any other stockholder of the Consolidated Water Company of Pomona did you suggest what action should be taken in their behalf, besides the employment of an attorney?

A I believe I did.

Q Did you suggest to any of them that a suit would be brought for their benefit by somebody else?

A Well, I suggested a suit would be brought, perhaps I did. I have forgotten just what I said.

Q Did you tell any of them what court the suit would be brought in?

A Yes, sir.

Q And what the nature of it would be. When was that with reference to the time Mr. Swan employed me, if you know?

A It was after you had decided that, in Mr. Swan's interest, you would bring the suit for him in the United States Court.

Q Was anything said by you to the other parties in those conferences to the effect that suit was to be brought for their benefit or was to be their suit, rather than Swan's suit?

A No, sir.

MR. AUSTIN: That is all.

REDIRECT EXAMINATION

BY MR. CAMPBELL:

Q Well, Mr. Stillwell, do I understand you now to say that when you got in touch with Swan there was no mention of suit, that it was only for the employment of an attorney?

A I believe the letter stated that Mr. Austin would look after his interests for a contingent fee, in case he

(Testimony of J. E. Stillwell.)

was successful, by suit or otherwise. I believe those words were used.

MR. CAMPBELL: Would you read the testimony of the witness, the third question asked by Mr. Austin?

(Testimony read as follows:)

"Q—Did you ever suggest to him whether the employment of an attorney would involve litigation or not? A—I am not sure. Q—Isn't it a fact that you simply suggest to him that he should employ an attorney, that it was possible a dissolution of the corporation might be brought about, and that nothing was said in your correspondence about what the means to be employed were, or what the relations of the parties might be? A—It was just simply to employ Mr. Austin to look after his interests. Q—In any conversation you had with any other stockholder of the Consolidated Water Company of Pomona did you suggest what action should be taken in their behalf, besides the employment of an attorney? A—I believe I did."

Q BY MR. CAMPBELL: How do you explain that? I am calling your attention to your previous testimony with respect to the employment of Mr. Austin, in which you say it was simply for the employment of an attorney, without any reference to the means to be employed by the attorney?

A Mr. Campbell, I have given you my best recollection.

Q Which of those statements is correct, Mr. Stillwell?

A Well, I did not think a suit would be necessary, until he said the code didn't provide for the dissolution

(Testimony of J. E. Stillwell.)

under those circumstances—I never supposed a suit would be necessary to distribute this money.

Q That was after you had heard from Mr. Swan, wasn't it?

A Well, Mr. Lathrop said, "Well, if we have no right to hang on to that money,"—

Q I asked you the question whether that was after you heard from Mr. Swan?

A Well, it must have been afterwards, because that was the first start I made to look up this matter, to find out the situation at Pomona, and then Mr. Allard called my attention to Mr. Swan.

Q And you promptly communicated with Mr. Swan, and he wrote you this letter to employ an attorney on a contingent basis, and then you talked to other members of the corporation and interested them, is that so?

A I went to them afterwards, yes, sir.

Q You employed an attorney?

A Yes, sir.

Q You didn't tell them that the suit had already been brought, did you?

A Suit had not been brought.

Q And they all signed up or authorized Mr. Austin to appear for them, before the suit was brought?

A Are you referring to the stockholders?

Q The stockholders?

A They were all very willing to join in.

Q And they all authorized joining in, prior to the time the suit was brought, is that correct?

A Before the suit was brought,—

(Testimony of J. E. Stillwell.)

Q All of the local stockholders joined in before the suit was brought, and after that time the suit was brought, is that correct?

A No, not all the local stockholders.

Q Well, some of them?

A Yes.

Q How many of them had not, and which ones?

MR. AUSTIN: We object to that on the ground that it is not material to any of the issues here.

MR. CAMPBELL: It is quite material, if your Honor please.

THE COURT: He may answer, if he knows.

A Well, Mrs. Smith was not asked to join, nor Sword was not asked to join, and Mr. Johnston, who holds one share.

Q I am talking about those who did actually join as defendants and as clients of Mr. Austin, who is also attorney for the plaintiff.

A What were you asking about them?

Q I am asking about James Loney, S. M. Haskell, Clefa Browning, Carl C. Boyd, F. C. Balfour, and Lillian B. Parry, all of whom have small numbers of shares of stock.

A Mr. Boyd employed Mr. Austin after the suit was brought.

Q He has one share?

A Yes, sir.

Q Who else employed Mr. Austin after the suit was brought?

A I don't know that I can say. I don't recollect.

Q You don't recollect any others?

(Testimony of J. E. Stillwell.)

A I am not sure that there was anyone else; it might be that Mr. Loney—I am not sure—Mr. Loney, I think, agreed to that before the suit was brought; I am not sure.

Q. Did you have written contracts with all these stockholders?

MR. AUSTIN: We object to that, if your Honor please.

A Yes, sir.

Q BY MR. CAMPBELL: Did you have an arrangement with Mr. Austin that you would share in any fees that were received in this transaction?

A I told him that I would be good for the costs, that I would see that the costs were taken care of.

Q Did you have any arrangement with Mr. Austin by which you share in the fees; that he will compensate you?

A Yes, sir.

MR. AUSTIN: I object to that as immaterial.

Q BY MR. CAMPBELL: What compensation do you get out of this matter?

MR. AUSTIN: Objected to as immaterial.

MR. CAMPBELL: He is the man that brought these people all together.

THE COURT: I guess the amount would be immaterial, wouldn't it? Sustained.

MR. CAMPBELL: An exception. That is all.

RE-CROSS EXAMINATION

BY MR. AUSTIN:

Q When was it that you had this correspondence you speak of with Mr. Swan?

A I think it was in June or July.

(Testimony of J. E. Stillwell.)

Q Of 1927?

A Yes, sir.

Q Do you know whether or not any efforts were made on behalf of Mr. Swan, by me, to bring about a distribution of the assets of the Consolidated Water Company of Pomona prior to filing suit, and before these other persons were consulted?

A I do.

Q When, and what was done?

MR. CAMPBELL: We object to that as incompetent, irrelevant and immaterial, what efforts were made.

THE COURT: It is not cross-examination, but you can make him your own witness for that purpose.

MR. AUSTIN: It is in answer to some of the inferences.

A At the annual meeting of the stockholders on August 31st you presented a motion there, a resolution, that the officers and directors be directed to take such action as might be necessary to dissolve the corporation and distribute the assets among the stockholders.

MR. CAMPBELL: We will stipulate to that. We will stipulate that they have asked us to dissolve the corporation, and we will stipulate that the defendant whom I represent refused to do so, and that they made a request to dissolve.

MR. AUSTIN: We will also stipulate that the corporation held a special stockholders' meeting to consider the matter.

MR. CAMPBELL: And decided in the negative.

MR. AUSTIN: And at that time the plaintiff, Mr. Swan, and I offered a resolution to disincorporate, and that it was considered by the meeting.

(Testimony of Robert E. Austin.)

MR. CAMPBELL: I don't know whether you offered it by Swan or not, but there was some such resolution offered.

Q BY MR. AUSTIN: Do you know, Mr. Stillwell, whether at the meeting of the stockholders on September 19th I appeared in behalf of Mr. Swan and offered a resolution asking the officers to prepare for a dissolution of the corporation?

A You so stated when you offered the resolution.

MR AUSTIN: That is all.

MR. CAMPBELL: That is all, Mr. Stillwell.

MR. CAMPBELL: I would like to ask Mr. Austin a question.

MR. AUSTIN: Sure.

ROBERT E. AUSTIN,

called as a witness, being interrogated not under oath, testified as follows:

Q BY MR. CAMPBELL: Mr. Stillwell brought this client to you, Mr. Swan, so far as you know?

A That is, it came through contact with Mr. Stillwell.

Q And when you were casting about to see which would produce the best results, and before you filed your suit, you were representing other stockholders who were residents of California, weren't you?

Q Well, I think I was, but I am not quite sure; I think I represented Mr. Haskell at that time, who holds ten shares of stock; and I think that in the answer that I filed I appeared for some other stockholder who holds one share apiece, and I think two who hold five

(Testimony of Robert E. Austin.)

shares apiece, so that the amount of stock held by others I represent besides Mr. Swan is small, except I think Mr. Loney owns fifty shares. Mr. Loney employed me since the suit was filed.

Q Some six or eight stockholders?

A I don't remember. But at the time I filed the suit, I represented, besides Mr. Swan, about thirty or forty shares of stock, perhaps.

Q How many stockholders?

A All that I finally appeared for, except Mr. Loney and Mr. Boyd. I think those two have employed me since.

Mr. Campbell: That is all.

THE COURT: I will take your statement.

MR. AUSTIN: The statement is that I was employed by Mr. Swan sometime along in July, I believe it is—it may have been August, 1927—to make an effort on his behalf to secure a dissolution of the Consolidated Water Company of Pomona, and to secure a distribution to its stockholders, particularly to himself, of his proportionate share of its assets. At the time of that employment there was no discussion or determination of just what steps would be taken. At that time I had not determined what steps would be taken, but I anticipated that it might be brought about by friendly negotiations; and pursuant to that employment I undertook such negotiations, but they promptly failed, and I then began to cast about to determine what kind of an action to bring and where to bring it, in order to produce the best results. And the present suit is the result of that consideration on my behalf. None of the other parties

who have been mentioned as employing me had employed me until after I had done considerable work on behalf of Mr. Swan, and at the time that I appeared at the stockholders' meetings that have been mentioned, I was then employed by no one and acting in no behalf, except Mr. Swan's, other than this, that Mr. Stillwell had informed me that he, as executor, felt that, as trustee of a number of the legatees who owned stock, that it was his duty to see that their interests were protected, so far as could be, and that he would like to have me bear that interest in mind and cooperate with him in bringing about a dissolution.

I think that, your Honor, puts in the additional facts that I wanted before the Court.

Filed Dec. 15, 1927. R. S. Zimmerman clerk, by L. J. Cordes, deputy clerk.

IN THE DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

GARY H. SWAN, Plaintiff, -vs- CONSOLIDATED WATER COMPANY OF POMONA, a corporation, G. A. LATHROP, et al., Defendants.	In Equity No. M 112 H STIPULATION

IT IS HEREBY STIPULATED by and between the parties hereto through their respective counsel that the defendants herein shall file a supplement to the transcript on appeal herein; that said supplement to transcript on appeal shall contain the following papers:

1. Reporter's transcript of testimony and proceedings on order to show cause and motion to dismiss, prepared by C. W. McClain, of Reynolds and St. Maurice, official reporters, United States District Court, and filed December 15th, 1927, and which said reporter's transcript is hereby stipulated to be a true and correct transcript of said testimony and proceedings.

3. Copy of this stipulation.

4. Praecipe of defendants calling for the foregoing papers.

with the same force and effect as if said papers had been incorporated in the original transcript.

DATED: April 21st, 1928.

Robert E. Austin, John N. Helmick,
Attorney for plaintiff.

Kemper Campbell
Attorney for defendants.

[Endorsed]: In Equity. No. M 112 H. In the District Court of the State of California, in and for the County of Los Angeles. Gary H. Swan, plaintiff, vs. Consolidated Water Company of Pomona, et al., defendants Stipulation. Filed Apr. 25, 1928 R. S. Zimmerman, R. S. Zimmerman clerk. Kemper Campbell and Chas. L. Nichols, attorney at law Fifth and Spring Streets, Los Angeles, California. Vandike 7735. 1408 Chapman Bldg. Attorney for defendants.

UNITED STATES OF AMERICA
District Court of the United States
SOUTHERN DISTRICT OF CALIFORNIA

Gary H. Swan, Plaintiff vs. Consolidated Water Co. of Pomona, et al., Defendants.	CLERK'S OFFICE No. M. 112 H. PRÆCIPE

TO THE CLERK OF SAID COURT:

Sir

Please issue Supplement to Transcript on Appeal and include therein the following papers:

Reporter's Transcript of Testimony & Proceedings on Order to Show Cause and Motion to Dismiss—Stipulation Re Transcript, and This Praecipe

Kemper Campbell
Atty for Defendants

[Endorsed]: No. M 112-H U. S. District Court Southern District of California Praecipe for ..... Filed Apr. 20, 1928 R. S. Zimmerman Clerk. By Edmund L. Smith Deputy Clerk.

UNITED STATES OF AMERICA
District Court of the United States
SOUTHERN DISTRICT OF CALIFORNIA

Gary H. Swan, Plaintiff vs. Consolidated Water Co. of Pomona, et al., Defendants.	No. M. 112 H. CLERK'S CERTIFICATE.

I, R. S. ZIMMERMAN, Clerk of the United States District Court for the Southern District of California, do hereby certify the foregoing volume containing 23 pages, numbered from 1 to 23 inclusive, to be the Supplement to the Transcript of Record on Appeal in the above entitled cause, as printed by the appellant, and presented to me for comparison and certification, and that the same has been compared and corrected by me and contains a full, true and correct copy of the Reporter's Transcript of Testimony and Proceedings on Order to Show Cause, Stipulation and Praecipe.

I DO FURTHER CERTIFY that the amount paid for printing the foregoing record on appeal is $ and that said amount has been paid the printer by the appellant herein and a receipted bill is herewith enclosed, also that the fees of the Clerk for comparing, correcting and certifying the foregoing Record on Appeal amount to .....and that said amount has been paid me by the appellant herein

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of the District Court of the United States of America, in and for the Southern District of California, Southern Division, this.....day of....., in the year of Our Lord One Thousand Nine Hundred and Twenty-eight, and of our Independence the One Hundred and Fifty-second.

R. S. ZIMMERMAN,
Clerk of the District Court of the United States of America, in and for the Southern District of California.
By

Deputy.

5479

IN THE

United States
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Gary Swan,
Appellant,
vs.
Consolidated Water Company of Pomona etc., et al.,
Appellees.

APPELLANT'S OPENING BRIEF.

ROBERT E. AUSTIN,
JOHN N. HELMICK,
Attorneys for Appellant.

Parker, Stone & Baird Co., Law Printers, Los Angeles.

CASES CITED.

IN THE

United States

Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Gary Swan,
Appellant,

vs.

Consolidated Water Company of Pomona etc., et al.,
Appellees.

APPELLANT'S OPENING BRIEF.

Plaintiff and appellant, a stockholder of the Consolidated Water Company of Pomona, filed his Bill of Complaint in equity in the court below against the Consolidated Water Company of Pomona, its officers and all other stockholders of said corporation.

Plaintiff alleged that he is a citizen and resident of the state of Ohio, and the owner of 65 shares of capital stock of said corporation which has a value of more than Three Thousand ($3,000.00) Dollars. That the corporation and all of the other defendants are citizens and residents of the state of California, and that the corporation is under the control and dominion of G. A. Lathrop, one of the defendants, and that its assets are being dissipated for his benefit and that the corporation had completed the business for which it was organized and that its capital was being diverted into channels not contemplated by its organ-

izers or permitted by its articles of incorporation. Plaintiff prayed for an accounting of the funds and property of the corporation, and for a distribution of its assets and other relief; all of which, together with many facts appurtenant to said cause of action more fully appears in the Bill of Complaint which is set out in full in the transcript of record, pages 3 to 17.

The corporation and its officers filed their motion to dismiss Bill of Complaint "upon the ground that there is insufficiency of fact to constitute a valid cause of action in equity" against them, record pages 16-17. The motion was granted and the court made and entered its decree dismissing said cause, record pages 18-19. From this decree, plaintiff and appellant has appealed to this court.

Argument.

Without attempting to restate the facts set out in Bill of Complaint, we present the following summary:

1. The defendant Lathrop, who to all intents and purposes is the corporation, has been guilty of—

(a) Fraud.

(1) In diverting funds;

(2) In failure to pay dividends;

(3) In using the company's money for his own purposes;

(b) Mismanagement—paying salaries to himself and Mrs. Gridley, in excess of value of services in one case and for none at all in the other;

(c) Betrayal of trust in the above matters and in refusal to vote stock of the Gridley estate, as the interests of the owners, the legatees, required and as they demanded (in writing).

2. Defendant, Lathrop, on behalf of the corporation, attempted to sell and actually delivered substantially all of the corporation's assets to the city of Pomona without the authorization of the stockholders as required by law.

3. The purpose for which the corporation was formed has been accomplished by the completion of its business and sale of all working assets, or has become impossible of attainment because no other water business can now be carried on by it.

4. That defendant, Lathrop, is attempting to embark the corporation in a new and different line of business not contemplated by the stockholders, nor within the purposes of the corporation.

5. That plaintiff has demanded of defendants, Lathrop and the corporation, that steps be taken to wind up the corporation and distribute its assets, and that said Lathrop has refused to bring about or permit a dissolution of said corporation.

6. That said corporation is not being operated, managed or controlled in the interests and for the benefit of the stockholders or in such a way as to give the stockholders or any of them, except said Lathrop, any benefit accruing from the business or earnings of said corporation.

In the court below, defendants urged that the court had no power to take charge of or interfere with the corporation or its business. It would seem that if there is anything of which a court of equity would have jurisdiction, it would be such a case as this.

The Supreme Court of the State of Illinois, in Dodge v. Cole, 97 Ill. 338, in discussing this general question, says:

> "The jurisdiction of a court of equity, does not depend upon the mere accident whether the court has in some previous case, or at some distant period of time, granted relief under similar circumstances, but rather upon the necessities of mankind and the great principles of natural justice, which are recognized by the courts as a part of the law of the land and which are applicable alike to all conditions of society, all ages, and all people . . . . . Where it is clear the circumstances of the case in hand require an application of those principles, the fact that no precedent can be found in which relief has been granted, under a similar state of facts, is no reason for refusing it."

then quotes from Toledo v. Penn, 54 Fed. 746, as follows:

> "Every just order or rule known to equity courts was born of some emergency, to meet some new conditions, and was, therefore, in its time, without a precedent."

then quotes at length and with approval from Fougeray v. Cord, 50 N. J. Eq. 185, 24 Atl. 499, a case similar to our own and says:

> "In the case of a wilful breach of trust, it not only compels the guilty trustee to restore the trust property, but removes it from the possession and control of the custodian who has proved unworthy."

The Michigan Supreme Court dealt with a situation very similar to ours in Miner v. Belle Isle Ice Co., 93 Mich. 97, 53 NW 218. 17 L. R. A. 412, in the course of which it says:

> "Plainly the defendants have assumed to exercise the power belonging to the majority, in order to secure personal profit for themselves, without regard to the interests of the minority. They repudiate the sugges-

tion of fraud, and plant themselves upon their right as a majority to control the corporate interests according to their discretion. They err if they suppose that a court of equity will tolerate a discretion which does not consult the interests of the minority . . . . . But it is also of the essence of the contract that the corporate powers shall only be exercised to accomplish the objects for which they were called into existence, and that the majority shall not control those powers to pervert or destroy the original purposes of the corporators . . . . . When several persons have a common interest in property, equity will not allow one to appropriate it exclusively to himself, or to impair its value to the others . . . . . ."

After more discussion, the Court concludes:

"What is the outlook for the future? This court, in view of the past, can give no assurance. It can make no order that can prevent some other method of bleeding this corporation if it is allowed to continue. If Lohrman be removed, who will take his place? He has the absolute power to determine. Once deposed, he may elect a dummy to take his place . . . . . I think a court of equity, under the circumstances of this case, in the exercise of its general equity jurisdiction, has the power to grant to this complainant ample relief, even to the dissolution of the trust relations. Complainant is therefore entitled to the relief prayed. A receiver will be appointed, and the affairs of this corporation wound up. Defendant Lohrman must account, and pay over all moneys illegally received by him paid to him, or paid out by him from the funds of the corporation."

This is a leading case and has been cited with approval by many courts. We have found no case where it has been criticized.

In Town v. Duplex, etc., 172 Mich. 528, it is cited with approval and the Court says:

> "These cases are exceptional and decision seems to proceed upon the theory that, in the exercise of jurisdiction to relieve from fraud and the effects of breaches of trust, relief may be granted to a suitor, although it involves sequestrating the property and winding up the affairs of a corporation; THE RESULT TO THE CORPORATION BEING AN INCIDENT MERELY OF ADEQUATE AND COMPLETE RELIEF."

To the same effect is Exchange Bank of Wewoka v. Samuel Bailey, 26 Okla. 246, 116 Pac. 812, 39 L. R. A. (N. S.) 1032. It holds:

> "Where the property of a corporation is being mismanaged, or is in danger of being lost to the stockholders and creditors, through mismanagement, collusion or fraud of its officers and directors, a court of equity has inherent power to appoint a receiver for the property of such corporation, and to require the officers to make an accounting upon petition of a minority stockholder therefor."

The Court dealing in New Jersey with a New Jersey corporation in U. S. Shipbuilding Co. v. Conklin, 126 Fed. 132, says:

> "Insolvency of a corporation, coupled with mismanagement of its affairs by its board of directors and such misconduct of the directors as is here charged justify the appointment of a receiver by the court of equity, independently of any statutory authority . . . ."

The case of Enterprise Printing & Pub. Co. v. Craig, 135 N. E. 189 (Indiana), resembled somewhat the case at bar. The Court said:

"It is contended that a court of equity has no power at the suit of an individual to decree a dissolution of a domestic corporation, and to wind up its affairs, unless such extraordinary power has been conferred upon it by the terms of a statute, citing as an Indiana authority Supreme Sitting, etc. v. Baker, 134 Ind. 293. This case which was an action by three stockholders of an insurance company against the company, having for its ultimate purpose the preservation of the resources of the company from the mismanagement of its officers, while the prayer of the complaint was for the dissolution on the ground of its insolvency and the general mismanagement of its officers and the appointment of a receiver to that end, the averments of the complaint were sufficient to sustain the court in the appointment of a receiver and the Supreme Court so held, but saying in the course of its opinion that a court of equity has no power independently of statute to dissolve an insolvent corporation, and saying that there were no authorities cited holding a contrary doctrine and that it knew of none. But the court in that case had no such circumstances to consider as we have here."

The court goes on to say that in that case there was no averment that the delinquent officers owned a majority of the stock, or that they could not be supplanted by other officers chosen by majority of the stockholders, etc., and holding generally that they made no showing that a dissolution of the corporation was necessary by that court, and if they had done so . . . . .

"The court would have been equal to the emergency. It is a maxim of equity that it will not suffer a wrong without a remedy, and the fact that it can find no precedent will not deter it from awarding relief in a proper case."

The judgment appealed from was affirmed. The Court sets out in this language:

> "There was a trial by the court and special findings and conclusions of law in favor of appellee Craig, upon which judgment was rendered, decreeing the appointment of a receiver to take charge of the property involved, to manage and conduct the business until the property could be sold, and to sell the property and divide the proceeds among the stockholders in proportion to the amount of stock held by each."

The Court quotes from Miner v. Belle Isle, *supra,* at some length, approving that case, then says that the general rule is that the court had no power to wind up the corporation in the absence of statutory authority, but that the rule is subject to qualifications, and that in proper cases the court has power to grant ample relief even to the dissolution of the trust relations and cites a large number of authorities.

In Zeckendorf v. Steinfelt, 225 U. S. 445 (an Arizona case), the appointment of a receiver for a corporation was upheld both by the Supreme Court of Arizona and the Supreme Court of the United States.

Appointment of receiver was also approved in Towle v. American Building and Loan Association, 60 Fed. 132, reading page 133, Court says:

> "Should the power be exercised in favor of complainant herein? The case is a peculiar one, the complainants are substantially both depositors and shareholders—the interest of the member is not that simply of a depositor in a bank or a creditor of a corporation —he holds no promise of the corporation for a return of his fund; he is part owner of the fund—has an in-

terest directly in the fund—and is entitled to a proportional share as owner upon distribution . . . . . that relief will be afforded to stockholder and co-partner upon proper showing is not seriously to be denied."

Courts of equity can and will wind up the business of a corporation, because of negligence, mismanagement and *ultra vires* acts of directors or where the purpose has been fulfilled or has become impossible.

In Porter v. Industrial Information Co., 25 N. Y. Supp. 328, the Court says:

> "Whenever, in the course of events, it proves impossible to attain the real objects for which a corporation was formed, or when the failure of the company has become inevitable, it is the duty of the company's agents to put an end to its operations, and to wind up its affairs; and if the majority should attempt to continue its operations, in violation of its charter, or should refuse to make a distribution of the assets, any shareholder feeling aggrieved will be entitled to the assistance of the courts." .

Klugh v. Coronaca Milg. Co., 66 S. Car. 100 44 S. E. 566;

Merchants Line v. Wagoner, 71 Ala. 581;

Minona Portland Cement Co., 167 Ala. 485;

O'Connor v. Knoxville Hotel Co., 93 Tenn. 708, 28 S. W. 308;

Thoroughgood v. Georgetown Water Co., 9 Del. Ch. 84, P.

In the English case of Cramer v. Bird, 6 L. R. Eq. 143, one railway company's property had been transferred to another company, the debts of the company paid and its surplus remained, Lord Romilly, after referring to certain "Companies' Acts", says:

"None of these acts were intended to supercede the principles of equity, but only to assist the court by giving additional powers to enable persons to enforce equities without those peculiar difficulties arising from a number of shareholders and from the rules of equity, which heretofore have made it impossible for persons in such cases ever to get a decree.

"I am of the opinion that there cannot be a plainer equity than this, that where the functions of a corporation have ceased, the managers of that corporation are bound to account for all moneys belonging to the corporation, and when such moneys are improperly retained this court will make a decree in order that they may be divided among the various members."

The modern corporation is created by its stockholders, not the state—all of them are interested parties and the court will not disorganize the corporation where none of its officers or stockholders are not before the court (*in re* French Bank case, 53 Cal. 495, 551, 2nd par.), but in our case all interested parties are before the court—the corporation, all of its officers and all of its stockholders. Why should the court not give all the relief the wrongs demand?

There is nothing sacred about the corporate form of doing business that exempts a man using it from responsibility to his fellow men and the courts for his moral and legal obligations. Courts of equity are prompt to supply a remedy for every wrong. In some cases, they operate by compelling the individual to make restitution and others by dissolution of the corporation and distribution of its assets. In one case, Fougeray v. Chord, *supra*, a leading Equity Court (New Jersey), transferred from the corporation, one-third of its assets to the abused stockholder and permitted it to continue its corporate existence as the property of the other stockholders with the remainder. In some

cases, the court takes possession of the corporation, in others, compels its officers to perform, but in every case, equity has, or finds a way, to protect the minority stockholder from the fraud of the majority.

In a case such as ours, a court in granting relief said: if it were powerless to appoint a receiver under such circumstances, not only would the law be open to grave reproach for inefficiency, but serious wrongs would go unredressed, and fraud of a stupendous character would escape and go unrebuked . . . . . A stockholder, though owning but a single share, may invoke and set in motion the plenary and far-reaching powers of a court of equity, to investigate, strike down, and strip of its covering any act of the corporation to which he belongs, when that act is tainted with fraud, or is *ultra vires* or illegal. This jurisdiction is one of the most salutary and conservative possessed by a court of equity, and neither the adroitness of the imputed fraud, nor the skill that seeks to hide the illegality of the impeached transaction, will thwart the exercise of the court's coercive and remedial authority.

We submit that the allegations of plaintiff's bill in this action bring him and his cause well within the rules laid down by the foregoing cases, and that this court should not turn him back into the hands of Lathrop to continue to suffer the abuses that have been practiced by him for years, and that the decree of the court below dismissing plaintiff's Bill in Equity should be set aside, and the Court below directed to proceed with the cause.

Robert E. Austin,
John N. Helmick,
Attorneys for Appellant.

5479

IN THE

United States

Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Gary Swan,
Plaintiff and Appellant,
vs.
Consolidated Water Company of Pomona, etc., et al.,
Defendants and Appellees.

APPELLEES' REPLY BRIEF.

KEMPER CAMPBELL,
CHAS. L. NICHOLS,
Attorneys for Appellees.

Parker, Stone & Baird Co., Law Printers, Los Angeles.

CASES CITED.

IN THE

United States

Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Gary Swan,
Plaintiff and Appellant,
vs.
Consolidated Water Company of Pomona, etc., et al.,
Defendants and Appellees.

APPELLEES' REPLY BRIEF.

Plaintiff and appellant has appealed from an order dismissing this action for want of jurisdiction and insufficiency of fact to constitute a valid cause of action in equity. [Tr. p. 18.]

Both grounds of objection were argued before the trial court and extensive briefs submitted thereon.

Want of Jurisdiction.

The bill of complaint should be dismissed on the ground that Swan was collusively made plaintiff "for the purpose of creating a case cognizable" in the United States District Court.

Jud. Code, Sec. 37;

Montgomery's Manual, Third Ed., Sec. 91; Sec. 764, 765;

Laughner v. Schnell, 260 Fed. 396, 397.

It is true that there are cases which seem to indicate that the courts have held with respect to stockholders' bills that a suit need not necessarily be deemed collusive in respect to the party plaintiff if the suit is brought by the plaintiff in good faith to protect his own individual right, even though others may join in paying the expenses.

Hutchinson Box Board & Paper Co. v. Van Horn, 299 Fed. 424.

In the Hutchinson case the foreign plaintiff was actually contemplating the bringing of a suit prior to any negotiation with other stockholders or their representatives, and ultimately actually authorized the institution of such suit. The plaintiff appeared at the trial, testified as witness and was actively connected with the entire litigation. It will be noted that there is a strong dissenting opinion in the Hutchinson case, in which the case of Cashman v. Amador & Sacramento Canal Co., 118 U. S. 58, 30 L. Ed. 72, is cited, and it is stated that the same "has never been modified."

The case at bar comes within the reasoning of the Cashman case. As there held, the "dispute or controversy" was "really and substantially" one between a county and citizens of the same state, and "the suit was originally brought by the county of Sacramento for its own benefit" and was carried on at its sole charge, while "the name of Cashman was used with his consent" as that of a mere nonresident landowner, "because the county could not sue in its own name" in the federal court. It was the suit of the county with a party plaintiff "collusively made," and "for the purpose of creating

a case cognizable" by that court, and thus within the Act of March 3, 1875, 18 Stat. 470, c. 137 (U. S. Comp. St. 1901, p. 511, Sec. 5).

The case at bar is even a stronger one in favor of defendants than the Cashman case in that it appears that not only was the plaintiff chosen by Stillwell and his attorney as the nominal plaintiff, but the plaintiff has not consented to act as such nor has he authorized the bringing of a suit. The testimony of Stillwell and Austin [Supplement to Transcript of Record] shows a most unusual and astonishing state of affairs and a manipulation by which it was hoped to invoke the jurisdiction of this court and which serves to distinguish this case from any decisions which the appellee has been able to discover involving the question submitted upon this motion.

The story in brief, as revealed by this testimony, is that J. E. Stillwell has a relative by marriage who happened to be one of the legatees under the will of Emily Brady Gridley, deceased, J. E. Stillwell and defendant G. A. Lathrop being co-executors of said will. The legatee was bequeathed shares of stock in defendant, Consolidated Water Company, but Stillwell's relative "thought he ought to have his share of the money" [Supplement to Transcript, p. 3], and Stillwell then interested himself in an endeavor (using the language of the lower court) "to get the cash for legatees who were, as a matter of law, entitled to the stock," * * * while, "as a matter of law, his business was to distribute the stock." [Supplement to Tr., p. 11.]

Having discovered there was a man by the name of Swan who owned some sixty-five shares out of the five

thousand shares issued, he wrote to Mr. Swan telling him "that Mr. Austin would take the proposition on a contingent fee, if he wished to join, and he wired back that he would like to do so." [Supplement to Tr., p. 6.]

We find no testimony in this record which indicates that Swan ever authorized the bringing of this suit. It will be noted that the bill is verified by Mr. Austin and not by Swan. It affirmatively appears from the testimony that Swan did not authorize the bringing of the suit. It will be noted that the real actor in this whole matter is Stillwell who not only desired in some way to liquidate the holding of his wife's brother-in-law but also desired to receive a split on the attorney's fee which probably has added to his zeal in this matter. [Supplement to Tr. p. 17; Tr. p. 18, lines 26, *et seq.*]

If Your Honors will read the examination of Mr. Stillwell by Mr. Austin [Supp. to Tr., pp. 17, 18]—and between the two of them the real facts are revealed—it will conclusively appear that this suit was filed without any authorization whatever by Swan and that Swan was chosen by Stillwell and Austin for the sole and collusive purpose of conferring jurisdiction upon this court in a matter which should be tried, if at all, in the state court. In response to questions by his own counsel, he admits that nothing was said in his correspondence about the means to be employed "or what the relations of the parties might be" but that "it was just simply to employ Mr. Austin to look after his interests." When Stillwell's attention was called to his previous testimony mentioning the possibility of a suit, he said [Supplement to Tr., p. 14]:

"A. Well, I did not think a suit would be necessary, until he said the code didn't provide for the dissolution under those circumstances—I never supposed a suit would be necessary to distribute this money.

"Q. That was after you had heard from Mr. Swan, wasn't it?

"* * * Well, it must have been afterwards" etc.

Attorney for plaintiff later on brings out from Stillwell his efforts to effect a voluntary dissolution purporting to represent Swan in this attempt. [Supplement to Tr., pp. 18, 19]. The date of the Swan correspondence is placed in June or July, 1927. These efforts in behalf of Swan for voluntary dissolution are dated August 31 and thereafter.

It is further shown that before the suit was brought a number of local stockholders were solicited as clients in this matter by Mr. Stillwell and after these other stockholders were induced to become clients, and all of them residents of California, Swan, who was a nonresident, was deliberately chosen to act as the nominal plaintiff without any authority whatever on the part of Swan so to do. We believe that this is not a situation where a plaintiff is in good faith desirous of prosecuting a suit and is himself here seeking to do so. It appears without controversy that Swan was importuned. Stillwell testified [Supplement to Tr., p. 6]:

"I wrote to Mr. Swan and told him that Mr. Austin would take the proposition on a contingent fee, if he wished to join, and he wired back that he would like to do so."

"To join" whom? Apparently to join others who were interested in a *voluntary* dissolution of a corporation or to join with others in employing Mr. Austin to liquidate the stock, by negotiation and not by suit, because as Mr. Stillwell says, "I never supposed a suit would be necessary to distribute this money," and, as Mr. Austin brings out, Stillwell "simply suggested to him (Swan) that he should employ an attorney" and nothing was said about the bringing of a suit or "type of an action" required.

The reporter has added to the transcript and same has been inserted as pp. 20 and 21 thereof, the statement of Mr. Austin. This statement sets the matter at rest beyond question. He says:

> "I was employed by Mr. Swan some time along in July, I believe it is—it may have been August, 1927—to make an effort on his behalf to secure a dissolution of the Consolidated Water Company of Pomona, and to secure a distribution to its stockholders, particularly to himself, of his proportionate share of its assets. At the time of that employment there *was no discussion or determination of just what steps would be taken. At that time I had not determined what steps would be taken,* but I anticipated that it *might be brought about by friendly negotiations; and pursuant to that employment I undertook such negotiations,* and *I* then began to cast about to determine what kind of an action to bring and where to bring it, in order to produce the best results. And the present suit is the result of that consideration on my behalf."

There is no intimation that Swan at the time of the employment anticipated a suit, it clearly appears that his attorney did not, and there is no indication that

Swan either authorized or knew anything about, or yet knows anything about the filing of this suit.

So we have in this case, differentiating it from those cases where suit is allowed, the fact that this suit is not only brought in behalf of the corporation which is a California corporation, but all of the other stockholders are residents of California, the attorney for plaintiff is also attorney for a number of other resident stockholders, and has actually appeared for them in the action—thus representing both plaintiff and defendants, the fact that attorney for plaintiff represented at least some of these nominal defendants prior to the institution of the action and the fact that Stillwell had guaranteed the costs of the suit so that counsel was at liberty to bring the action in the name of any of the other parties whom he represented and who were residents of California and the fact that he was not definitely authorized by plaintiff Swan to bring the action nor was any suit contemplated by Swan or by Stillwell when Austin was employed, nor has any subsequent authorization to bring this suit been had.

Collusion within the meaning of the statute (Judicial Code, sec. 37) has been proven. The real party in interest, and the party for whose benefit this suit is brought, is the corporation. As will later be shown, no stockholder, as an individual, has a right to have awarded to him a portion of the assets of the corporation, and therefore this suit is merely a stockholder's bill brought for the benefit of the corporation.

As stated by Judge Montgomery in his Manual, on page 73:

"As to whether the case is within the scope of its jurisdiction, is a question which the court is bound to examine and determine, although not presented by the parties,—and even where they consent to a determination of the controversy on its merits. 'Consent cannot confer jurisdiction, and want of jurisdiction cannot be waived.' The same obligation rests upon a reviewing court; and on every writ of error or appeal, the preliminary inquiry is as to the jurisdiction (1) of the appellate court, and (2) of the court from which the record comes. And, inasmuch as a federal court is a court of limited jurisdiction, the fact that the case is one of which the court may take cognizance must appear affirmatively from the record,—otherwise a reversal must be ordered.

"Unless the contrary affirmatively appears, a presumption will be indulged that a cause is not within the court's jurisdiction."

O'Neil v. Co-operative League of America, 278 Fed. 737.

Insufficiency of Fact to Constitute a Valid Cause of Action in Equity.

As indicated by the title of the bill, the suit is "for dissolution of corporation and for a receiver." Consolidated Water Company of Pomona is a California Corporation. The matter is governed by the law of the state of California. Sections 564 and 565 of the Code of Civil Procedure and the decisions of the Supreme Court of California applying these provisions are determinative against plaintiff's bill. These sections are as follows:

"Sec. 564. Appointment of receivers. A receiver may be appointed by the court in which an action is pending, or by the judge thereof.

"1. In an action by a vendor to vacate a fraudulent purchase of property, or by a creditor to subject any property or fund to his claim, or between partners or others jointly owning or interested in any property or fund, on the application of the plaintiff, or of any party whose right to or interest in the property or fund, or the proceeds thereof, is probable, and where it is shown that the property or fund is in danger of being lost, removed, or materially injured;

"2. In an action by a mortgagee for the foreclosure of his mortgage and sale of the mortgaged property, where it appears that the mortgaged property is in danger of being lost, removed, or materially injured, or that the condition of the mortgage has not been performed, and that the property is probably insufficient to discharge the mortgage debt;

"3. After judgment, to carry the judgment into effect;

"4. After judgment, to dispose of the property according to the judgment, or to preserve it during the pendency of an appeal, or in proceedings in aid of execution, when an execution has been returned unsatisfied, or when the judgment debtor refuses to apply his property in satisfaction of the judgment;

"5. In the cases when a corporation has been dissolved, or is insolvent, or in imminent danger of insolvency, or has forfeited its corporate rights;

"6. In an action of unlawful detainer, in those cases in which the Superior Court has exclusive original jurisdiction;

"7. In all other cases where receivers have heretofore been appointed by the usages of courts of equity. (Amendment approved May 3, 1919; Stats. 1919, p. 251.)"

"Sec. 565. Appointment of receivers upon dissolution of corporations. Upon the dissolution of any corporation, the Superior Court of the county in which the corporation carries on its business or has its principal place of business, on application of any creditor of the corporation, or of any stockholder or member thereof, may appoint one or more persons to be receivers or trustees of the corporation, to take charge of the estate and effects thereof and to collect the debts and property due and belonging to the corporation, and to pay the outstanding debts thereof, and to divide the moneys and other property that shall remain over among the stockholders or members. (Amendment approved 1880; Code Amdts. 1880, p. 4.)"

It will be seen that there is no provision for the appointment of a receiver which by any possible construction of the bill of complaint is applicable here. Subdivisions 1, 2, 3, 4 and 6 of sec. 564 are obviously outside the scope of the bill and as to subdivision 5, the corporation must have already been "dissolved" or "insolvent" or "in imminent danger of insolvency" or "has forfeited its corporate rights." There is no such allegation in the bill.

As to subdivision 7, the Supreme Court of this state has in no uncertain terms eliminated it from any pertinency to this case. (See authorities hereinafter cited.)

As to sec. 565, the language "upon dissolution" has been construed to mean "*after* dissolution." (Henderson v. Palmer Union Oil Co., 29 Cal. App. 451 at p. 458.)

That there is no ground presented for dissolution will appear also from authorities hereinafter quoted for the court's convenience.

Elliott v. Superior Court, 168 Cal. 727, 728, 730-733:

> "At the time it filed its complaint the plaintiff moved the court for an order appointing a receiver of the assets of the defendant for the benefit of itself and all other persons similarly situated. The grounds of the motion were 'that the plaintiff has no adequate remedy at law, and that the funds out of which the plaintiff and other creditors must look for the payment of their claims is in danger of waste, loss and destruction.'
>
> "The order appointing the receiver is void and all of his acts performed in pursuance of his illegal appointment are necessarily void. Section 305 of the Civil Code, found in title I, part IV of that code, and which title contains provisions applicable to all corporations formed under the laws of this state, provides: 'The corporate powers, business, and property of all corporations formed under this title *must be exercised, conducted and controlled* by a board of not less than three directors.' The court, through the appointment of a receiver, exercises the powers, conducts the business and controls the property of the corporation, which by virtue of this section, can only be exercised, conducted, and controlled by a board of directors. There is no law of this state, nor can any decision of our Supreme Court be found, which authorizes a court, through a receiver, to take charge of the business and property of a corporation before dissolution, dispose of its assets and wind up its affairs. On the contrary, this court has repeatedly and consistently held for more than fifty years last past that the courts have no jurisdiction to appoint a receiver of the entire

assets of a corporation in a suit prosecuted by a private party. (Neall v. Hill, 16 Cal. 151; 76 Pac. 508—French Bank Case, 53 Cal. 495—Smith v. Superior Court, 97 Cal. 348; 32 Pac. 322—Smith v. Los Angeles and P. R. Co., 4 Cal. Unrep. 237; 34 Pac. 242—Murray v. Superior Court, 129 Cal. 628; 62 Pac. 191—Fischer v. Superior Court, 110 Cal. 129; 42 Pac. 561.) * * *

"* * * A corporation cannot in this indirect manner destroy itself. It cannot put beyond its reach the power to do that for which it was created. It is the creature of the law and its powers must be exercised in the manner prescribed by law and not otherwise. If it wishes to die, it may do so, but only in the way ordained by law. It must first satisfy and discharge all claims and demands against it; two-thirds of its members or stockholders must resolve upon dissolution and the provisions of title VI, part III of the Code of Civil Procedure relating to the voluntary dissolution of corporations must be complied with. If it must be put to death against its will, then the state and not a private party must institute proceedings with that object in view. In Smith v. Superior Court (97 Cal. 348; 32 Pac. 322), this court was asked to review an order of the Superior Court of Los Angeles county appointing a receiver in an action brought by the California Bank against the Los Angeles and P. R. Company to recover judgment upon an unsecured promissory note. As in the case now under consideration, the plaintiff in that case applied for and the defendant consented to the appointment of a receiver and the court made the appointment. Yet this court held that the order appointing the receiver was void and in excess of the jurisdiction of the Superior Court. * * * "

The leading case, and one which has been repeatedly followed, is French Bank Case, 53 Cal. 495, 550-554:

> "The case here not being *in error* but upon *certiorari*, the inquiry is of course to be confined to a consideration of the *mere power* of the district court to *appoint a receiver* in a case of this impression.
>
> "Irrespective of the effect of the fifth subdivision of sec. 564 of the Code of Civil Procedure, which will be presently considered, there is no jurisdiction vested in courts of equity to appoint a receiver of the property of a corporation in a suit prosecuted by a private party. This is only to say that there is no jurisdiction vested in these courts in such a case to dissolve a corporation; for the power of a receiver, when put in motion, of necessity supersedes the corporate power. It necessarily displaces the corporate management and substitutes its own, and assumes, in the language of the order under review, 'to do all and everything necessary (in the judgment of the receiver, under the advice of the court) to protect the rights of the creditors and depositors of said corporation.'
>
> "This precise question was brought directly under consideration here in the case of Neall v. Hill, 16 Cal. 145, where, in a suit brought by a stockholder, a receiver had been appointed by the district court to take possession of the property of the 'Gold Hill and Bear River Water Company,' a corporation existing under the laws of this state. The opinion in that case, rendered by Mr. Justice Cope, and concurred in by the whole court, after referring to the adjudicated cases in England and in this country, uses this language: 'This decree, if permitted to stand, must necessarily result in the dissolution of the corporation; and in that event the

court will have accomplished, in an indirect mode, that which, in this proceeding, it had no authority to do directly. It is well settled that a court of equity, as such, has no jurisdiction over corporate bodies for the purpose of restraining their operations, or winding up their concerns. We do not find that any such power has ever been exercised in the absence of a statute conferring the jurisdiction.'

* * * * * * * *

"We proceed, therefore, to inquire whether the jurisdiction of the courts of equity, in the respect referred to, has been enlarged by any statute of this state. The only statute brought to our attention, which is supposed to have that effect, is sec. 564 of the Code of Civil Procedure.

* * * * * * * *

"That the case brought into the District Court of the Fifteenth Judicial District is not included in the sixth subdivision of this statute has been determined already; and the appointment here not having been made 'after judgment,' of course the third and fourth subdivisions can have no application. The first and second subdivisions provide for the appointment of a receiver in an action brought by a vendor to vacate a fraudulent purchase; in aid of a creditor's bill; also, in proceedings involving questions between partners; also, in suits of foreclosure brought by mortgagees when the security is likely to be lost or seriously impaired. These subdivisions do not assume to create a substantive right of action where none existed before. Their aim is to provide a more efficacious remedy in the conduct of actions, the right to bring which already exists, and are elsewhere provided for. The action by a vendor to vacate a fraudulent purchase, or by mort-

gagee to foreclose a mortgage, is not created by the statute we are now considering—they exist independently of its provisions, and would continue to exist if this statute were repealed.

* * * * * * * *

"We are, therefore, of opinion that the said orders of October 7, 1878, assuming to appoint a receiver in the case of Thomas J. Gallagher v. L. A. Societe Francaise d'Epargnes et de Prevoyance Mutuelle, were in excess of the jurisdiction of the district court, and that they be annulled. So ordered."

Fischer v. Superior Court, 110 Cal. 129, 140-142.

"In Neall v. Hill, *supra,* where a receiver had been appointed to take possession of the property of a corporation, the court said: 'It is well settled that a court of equity, as such, has no jurisdiction over corporate bodies for the purpose of restraining their operations or winding up their concerns. We do not find that any such power has ever been exercised in the absence of a statute conferring the jurisdiction.' * * * The general authorities on the subject are to the same effect. Beach on Receivers, section 403, speaking of receivers of corporations, says: 'It is, in the first place, to be remarked that the jurisdiction to appoint a receiver in these cases is wholly statutory.' The question to be determined, therefore, is whether or not there is any statutory provision under which power is given a court to appoint a receiver in a case like the one at bar during the pendency of the suit.

* * * * * * * *

"It is difficult to understand upon what ground the right to a receivership is based in the case at bar, or what that position is which, it is contended, lifts the plaintiff in the case above the principles

hereinbefore stated, and enables him, through the agency of a receiver, to take from a corporation the management of its affairs, during the pendency of an action."

"Upon dissolution," as used in C. C. P. 565, means *after* dissolution has been decreed.

Henderson v. Palmer Union Oil Company, 29 Cal. App. 451, 458:

"It is at least perfectly clear that 'upon dissolution' does not mean 'before dissolution.' The phrase undoubtedly means 'after dissolution,' and it is not limited to any particular lapse of time. It may include an application made immediately following the dissolution or one separated by quite a period of time.

"Of course, after dissolution the corporation is not 'alive,' and it is not strictly accurate to say that it has a place of business. But if the section is to have any application at all, it must be in a case of dissolution, as by no possible construction can it refer to the appointment of a receiver for a going concern."

It is only in a case where the directors are in jail, or have wholly abandoned their trust, and the corporation is not doing business, that a receiver may be appointed. (California Fruit Growers' Association v. Superior Court, 8 Cal. App. 711, 712.)

If directors are not conducting the business lawfully, the remedy is by injunction. (Dabney Oil Co. v. Providence Oil Co., 22 Cal. App. 233, 237-239.)

As stated in the case of Lyon v. Carpenters' Hall Assn., 66 Cal. App. 550, 552:

> "If Carpenters' Hall Association (a corporation) had suffered no forfeiture, or if it had not been dissolved, the courts would have no right through a receiver to take possession of the corporation's property, to sell the property, or to distribute the proceeds among the persons entitled thereto, because the law has placed all of those powers in the hands of the directors of the corporation. (Civ. Code, sec. 305.)"

There is no case cited by counsel in which a court has granted a receiver under circumstances as set forth in this case because some impatient stockholder employs over-zealous counsel to file a suit.

It would be a very disastrous state of affairs, one which would bring calamity upon the business of this nation, if any dissatisfied stockholder, under the facts alleged in this bill, could come in and demand the destruction of the corporation, or what amounts to a wrecking of it by putting it into the hands of a receiver.

California Statutes and Decisions Have Established a Rule of Property by Limiting Dissolution of Corporations. Rules of Property So Established Will Be Respected by the Federal Courts.

Corporations are the mere creatures of the statute. The state has the exclusive power to create them, to measure the rights, liabilities, privileges, immunities and responsibilities of these artificial entities and of their stockholders. When stock is acquired in the state of California, the purchaser has a right to rely upon the fact that the corporation in which stock is acquired will exist for fifty years, for the period designated in the franchise or by statute, and that it cannot be dissolved

"* * * this court has deferred to decisions of the state courts, even in cases where those decisions were not expressive of public policy or declaratory of a rule of property. Columbia Digger Co. v. Sparks, 227 F. 780, 142 C. C. A. 304; American Surety Co. v. Bellingham Nat. Bank, 254 F. 54, 165 C. C. A. 464."

The court declared further that:

"'Broadly speaking, the rule is that when the decision in a federal court involves no federal question, the case being there solely by reason of diversity of citizenship, and when the law invoked, whether common law or statutory law, is of local character, and has become established as a part of the law of the state, a federal court will follow the decisions of the state court of last resort when decisions of that court exist.' So in Sturtevant Co. v. Fidelity & Deposit Co., 285 F. 367, the Circuit Court of Appeals for the Second Circuit, in dealing with a bond given by a school contractor, said: 'Although the question is one of general law * * * yet, under well-settled principles, this court should, if possible, be in harmony with the New York courts in respect of a question of this character.'

"From the foregoing considerations we reach the conclusion that, in determining the rights of litigants arising out of a contract of suretyship such as this, made and to be performed in the state of Washington, a federal court should follow the rule established by the highest court of that state."

In the case of *T. L. Smith Co. v. Orr,* 224 Fed. 71 (C. C. A. 8), decision by Judge Sanborn, it is held:

"The question is whether or not a receiver appointed in a creditors' suit in Missouri to administer

> and convert into money the property of an insolvent debtor, and to distribute the proceeds thereof among its creditors, has the right and power to avoid an unrecorded condition of a contract of conditional sale which the creditors might have disregarded if no receiver had been appointed. This is a question of local law, of the construction of a statute of Missouri, and of the determination of the judicial practice under it in that state, and if there were a decision of this question by the highest judicial tribunal of that state it would be controlling in the federai courts. No such decision, however, has been cited or found, but the following rules of law and practice seem to prevail in the courts of that state * * * "

This language is followed by an analysis of the decisions of the statutes of the state of Missouri, which decisions and statutes the court endeavors to follow.

If the powers of a receiver are limited by the laws of the state in which he is appointed, it surely follows as a matter of course that the appointment of the receiver in the first instance is limited by the laws of that state. It would be a grotesque situation if a federal court could appoint a receiver contrary to the provisions of local law and allow him to reach out and grasp the property of the corporation itself, and thereupon be required to circumscribe his handling of the property in accordance with local laws.

In the case of *Zacher v. Fidelity Trust, etc. Co.,* 106 Fed. 593 (9 C. C. A. 6), decision by Judge Lurton, it is held:

> "Where the question is as to the validity of a particular foreign assignment under the law of

> Kentucky, we ought not to hesitate to yield to the authority of the highest court of that state, when we find that upon an identical record between the same parties it has held the assignment in question not such a voluntary assignment as by the comity of that state is valid as against the subsequent lien of local creditors. The decision of the Kentucky court is one of blended law and fact, and so far concerns the purely local policy of that state that we are not disposed to refine in respect to how far we might reach a different conclusion upon the same facts and yet administer the law of the state. It would be a scandal upon the administration of justice if two co-ordinate courts, administering the same law, should reach a different conclusion upon the same facts; and more especially would this be so in respect of a matter in which the highest court of the state whose comity and policy was involved had led the way by a decision between the same parties in respect to another fund embraced in the same assignment."

In the case of *Loewe v. California State Federation of Labor, et al.*, 189 Fed. 714, Judge Van Fleet concedes that "in the administration of their equitable jurisdiction" the federal courts are bound by "local statutes," and even in the absence of local statutes, the reasoning of a state court "is always to be regarded with respect, and will be followed, if persuasive of a correct statement of the law," although not absolutely binding.

We have here under consideration all of these factors, to-wit: (1) A rule of property; (2) local statutes; and (3) persuasive decisions of the Supreme Court of California.

Appellant cites a number of cases wherein receivers have been appointed for *insolvent* corporations. These decisions do not aid appellant, for the reason that it is conceded that where a defendant corporation is insolvent a stockholder or creditor would be entitled to have a receiver appointed, under section 564 of the Code of Civil Procedure of California. Most of the authorities cited by plaintiff are of this character, and the others are readily distinguishable from the case at bar. In other words, the position of appellees is that even if the court were not circumscribed by the statutes of California, and this were not a case of a rule of property, the court, in the exercise of its general equity jurisdiction would not under the allegations of this bill grant a receiver, nor would it entertain an action for the dissolution of the corporation.

We refer briefly and *seriatim* to the authorities cited by appellant:

Cramer v. Bird, 6 L. R. Eq. 143.

This case is an English case decided in the year 1868. The company had ceased to carry on its business, the directors had rendered no account and declared no dividends and no meeting of the shareholders had been held since the passage of the last Act concerning the corporation.

Enterprise Printing & Publishing Co. v. Craig, 135 N. E. 189 (App. Ct. of Indiana, Div. 2).

This is an isolated case in which the state court of Indiana has admittedly gone farther than perhaps any other court in the United States, in an endeavor to adjust a difficulty between a stockholder who owned 480 shares

as against other stockholders who owned 520 shares. There was apparently no right of cumulative voting, and plaintiff Craig in that case could not elect himself to the board of directors, and he desired participation in the business. The situation was more in the nature of a partnership in corporate form, Craig owning 480 shares and the Neal family owning 520 shares. The bill in that case showed that the Neal family had fixed exorbitant salaries for themselves, absorbing the profits of the corporation, and had indulged in a long series of misappropriation and embezzlements of corporate funds and properties. In the Craig case it was shown also that the books of the corporation were so kept as to conceal numerous fraudulent financial transactions, and that stockholder Craig was not permitted the right to examine the books. It appears that there was no trouble in the Enterprise Printing & Publishing Company so long as Craig was allowed to be on the board of directors. In California, the minority is protected by the law giving the right to cumulate the shares and vote the entire amount for one or any other proportionate number of directors, as the case may be.

It will readily be seen that a number of factors are present in the Enterprise case that are not present in the case at bar. In the case at bar the minority under the law has the right to elect its proportionate number of directors, the stockholders are at perfect liberty to examine the books and audit them, no fraud has been charged in the bill, salaries have not absorbed the profits, nor are there any falsifications of records or any concealment of any kind. On the contrary, the operation of the corporation under the management of Lathrop

has been exceedingly profitable. The value of the stock has increased from almost nothing to $120.00 per share.

Exchange Bank of Wewoka v. Samuel Bailey, 26 Oklahoma 246; 116 Pac. 812.

In this case, it was alleged that no certificate or statement of condition of the affairs of the bank was made or rendered and that the president and the cashier of the bank refused to make a statement of the business of the bank for over a year, or of the profits; that the officers and directors complained of refused to permit plaintiff to participate in the control of the business or permit him to examine and ascertain for himself the condition of the books. The court said:

> "If such acts do not constitute fraud they, at least, constitute such gross mismanagement, *the bank being insolvent,* as to justify a court of equity in reaching out its arm and protecting the minority stockholders and the creditors of the bank by placing the assets of the bank in the hands of a receiver."

This case is distinguished from the present case in that the corporation was insolvent.

Fougeray v. Cord, 50 N. J. Eq. 185; 24 Atlantic 499.

In this case, it was alleged that the plaintiff and two associates entered into an agreement to subdivide and sell a farm. The plaintiff complains that his two associates elected themselves directors, sold the farm at a profit of $37,000.00 and paid themselves salaries of $16,000.00, whereupon they organized another company and turned over the assets to the other company. After the filing

of this Bill in Equity, they returned the assets, but the court held that the plaintiff was entitled to his relief in spite of this attempted restitution. It will be readily seen that the facts in the above case have no bearing upon the case before this court.

We have hereinbefore adverted to the *French Bank Case,* 53 Calif. 495.

Klugh v. Coronaca Milg. Co., 66 S. Car. 100; 44 S. E. 566.

This case was decided by the court of South Carolina, and it was held that under the law of that state a minority stockholder had the right to bring an action to wind up the business of the corporation upon a showing of fraudulent acts, *ultra vires* acts, negligence of directors, and a request to the corporation to correct the alleged wrongs.

A decision from South Carolina would have no bearing upon this case, in view of the consistent and well-settled law of this state in regard to the dissolution of corporations.

Merchants Line v. Wagner, 71 Ala. 581.

The holding in this case was directly opposite to the contentions made by the appellant. The court said:

> "Very true, the bill charges that three, a majority of the directors, have combined and formed a ring for their own private profit, at the expense of the other stockholders, and many acts of wrong doing are charged against these three directors. No act is charged that is *ultra vires,* and there is no averment that the corporation's assets are imperiled by the insolvency of the parties."

The term for which the corporation was incorporated had expired and the venture was continued by common consent. The court held that, considered as a bill to settle the accounts of a dissolved corporation, the action could be maintained, but that it stated no grounds for the dissolution of a corporation previous to the natural expiration of the term which had been agreed upon by the incorporators.

Miner v. Belle Isle Ice Co., 17 L. R. A. 412 (Mich.)

This has no resemblance to the case at bar. That was a case in which the dominating stockholder, with a bare majority of the stock, and by a long series of transactions definitely set up in the bill, had looted the corporation and had expended its profits, and had so managed the corporation that its business could not be carried on with profit to the stockholders. The record in that case showed fraud, bad faith, including a long series of illegal transactions, the absorption of all of the profits by the defendant Lorman, and the practical loss of the investment value of the interests of the minority stockholders. We have no such circumstances in the case at bar. On the contrary, it is admitted in the bill that under the management of Lathrop, with practically no investment at all, the corporate assets increased to an amount where the bulk of them were sold for $831,000.00, and after paying all corporate obligations there is a net profit of $600,000.00. The only items seriously questioned in the case at bar are credits to the president amounting to around $22,500.00, shortly subsequent to the sale which he negotiated at such a handsome profit to the corporation. It is admitted here that the majority

of this stock is owned by defendant Lathrop. In other words, aside from his other assets, it is admitted that he has assets of his own amounting to $300,000.00. What court of equity has ever granted a receiver, wound up the affairs of a corporation, and destroyed the corporation, because of some difference of opinion as to the matter of compensation of the president of the corporation? Defendant Lathrop has no objection at all to a friendly suit brought in the state court to determine the propriety of this extra compensation for the sale of this property. There is no court in the land, after hearing the history of this corporation, that will hold that the time and effort and business acumen devoted for years to the consummation of this sale, in addition to the usual duties of managing a water business, was not worth the amount awarded. But if the court should so hold, Lathrop is able, ready and willing to return the money to the treasury. The only method by which transactions can be had is through the board of directors. We have here the picture of Mr. Stillwell, an attorney at this bar, writing a letter of solicitation to a total stranger, and getting a contract out of him on a contingent fee basis; and without any authority from Swan in so far as this record discloses (Stillwell was upon the stand, and counsel for appellant was given an opportunity to make a full statement) filing this suit. It is a sad spectacle indeed to see Mr. Stillwell, a co-executor in the estate of Gridley, stirring up dissensions and attempting to wreck the corporation in which the estate of Gridley has an interest and which it is his sworn duty to preserve, coming into this court and seeking to invoke its assistance in his endeavor to liquidate the corporation so that he may receive a fee.

The decision in the Belle Isle Ice Co. case quotes with approval the language of Judge Wallace, in which he says:

> "It cannot be denied that minority stockholders are bound hand and foot to the majority in all matters of legitimate administration of the corporate affairs; and the courts are powerless to redress many forms of oppression, practiced upon the minority under a guise of legal sanction, which fall short of actual fraud."

This is a fair statement of the law. In the case at bar there is no oppression. In fact, none is charged in the bill. No *facts* are alleged which indicate oppression, much less actual fraud.

Minona Portland Cement Co., 167 Ala. 485.

It was conceded in this case that the allegations of the complaint were sufficient to entitle the plaintiff to dissolution under the laws of Alabama. The complaint alleged that the corporation was a failure; that the business for which it was formed could never be inaugurated or carried on, and the court held that under these circumstances, in view of the law of the state of Alabama, the plaintiffs were entitled to relief.

O'Connor v. Knoxville Hotel Co., 93 Tenn. 708, 28 S. W. 308.

In this case the court granted relief in view of the fact that the corporation complained of was organized to build a projected hotel at a cost of $200,000.00. $72,000.00 worth of stock had been subscribed. No action had been taken by the corporation for four years. Taxes and interest were eating up the capital already subscribed and

the population had moved away, making the building of the hotel impractical.

The court held that under these circumstances relief should be granted. There are no such allegations in the instant case.

Porter v. Industrial Information Co., 25 N. Y. Sup. 328.

This was another insolvency case. The court said:

"The application for the appointment of receiver seems to be warranted by Section 1810, Subdivision 3, of the code. The facts as gathered from the papers before me seem to be that the corporation is wholly insolvent, that it has defaulted in one law suit, and that another will come to judgment shortly."

Supreme Sitting etc. v. Baker, 134 Ind. 293.

This was also an insolvency case. The opinion of the court reads:

"It is alleged that appellees are informed and believe and, therefore, charge the fact to be, that the appellant corporation is now insolvent."

Thoroughgood v. Georgetown Water Co., 9 Del. Ch. 84.

In this case relief was refused, the court saying:

"As the case now stands, the chancellor does not feel that the resources and power of the directors have been exhausted to remedy the condition complained of."

Toledo v. Pennsylvania, 54 Fed. 746, holds that the federal court has jurisdiction "of the whole case" in a suit in equity praying that certain railroad companies be restrained from refusing to afford equal facilities to

the complainant, holding that "a court of equity has power to contrive new remedies and issue unprecedented orders to enforce rights secured by federal legislation, provided no illegal burdens are imposed thereby." (Syllabus.)

This authority would seem to indicate the concession on the part of the appellant that the remedy he is seeking is unprecedented, that he is endeavoring to establish here a new rule.

Towle v. American Bldg., Loan & Inv. Soc., 60 Fed. 132, cited by plaintiff, is also a case in which a receiver was appointed for an *insolvent* corporation. This distinguishes the case from the case at bar without further comment. The court makes pertinent references, however, to the matter of jurisdiction. It says:

> "A much more serious objection, however, is the one that the parties to the suit have been collusively arranged for the purpose of creating a case cognizable in the federal courts. It cannot be seriously disputed that, in the absence of collusion, a stockholder has a a right to bring his action against the corporation in the federal courts, provided diverse citizenship exists, and the case is one in which the stockholder is entitled to an action at all. * * *
>
> "So apparent already had the abuse become that Congress inserted in the act of March 3, 1875, the provision that if, at any time in the progress of the case, either originally commenced in the circuit court or removed there from the state court, it should appear that the suit did not really and substantially involve a dispute or controversy properly within the jurisdiction of the federal court, or that the parties to the suit had been improperly or collusively made or joined, either as plaintiffs or defendants,

for the purpose of creating a case cognizable or removable to the federal court, the court should proceed no further, but dismiss the suit peremptorily, or remand it to the state court.

"I conceive it to be the duty of the federal courts to examine each case carefully to ascertain if it falls within the terms of this provision. The jurisdiction of the state courts, and the application of state policy, ought not to be taken away, except in those cases which fall within the spirit of the judiciary act. The system of federal courts is not intended to supersede the state courts, but only to furnish a tribunal where the substantial rights of citizens of different states may be determined. To extend this jurisdiction further, so as to take in the controversies which are practically between the citizens of the same state, is to erect tribunals not contemplated, either by the Constitution of the United States or of the state, and contrary to the spirit of both. The fact of diverse citizenship of complainant and defendant, in such a case as this, is not, therefore, in my opinion, standing alone, a sufficient warranty to hold jurisdiction. In the absence of any good reason for bringing the action into the federal courts, I would be disposed to hold that the arrangement of the parties was collusive for jurisdictional purposes. The question then arises, is there any substantial reason why the shareholder, seeking an administration of these assets, should select the federal courts? And, if so, was it the reason that dominated the bringing of this action therein?"

We have no quarrel with the rule in other jurisdictions that where the purpose of the corporation has been fulfilled or has become impossible the courts of equity can interpose where it is absolutely necessary to do so.

The articles of incorporation of Consolidated Water Company are not set forth in the bill and it is not alleged what *all* of the purposes of the corporation are, nor is it alleged that *all* of the purposes of the corporation have been fulfilled or that they are impossible of fulfillment.

Town v. Duplex-Power Car Co., 172 Mich. 519, presents a state of facts entirely at variance with the allegations of the bill herein. In that case there was a "conspiracy to wreck the company." (In the case at bar the conspiracy to wreck the company is chargeable to the plaintiff and not to the defendants.) There were also two sets of directors, who "were each claiming to be lawful officers of defendant company." The court says:

> "Attention has been directed to the fact that the court below had before it more than a sworn bill and sworn answers. Upon the application for a receiver, the court was bound to consider whether, in view of all facts presented, there was reasonable prospect that the defendant company would be able to carry on its business and save its property; whether, however lawful the debt secured by mortgage of its assets may be, the security was given and its foreclosure was contemplated with the purpose on the part of the defendants to secure the property of the company for themselves; whether it was likely that with rival boards of directors contending for control of the company either could command business success; and, finally, whether the charges that defendants were conspiring to exclude and injure the complainants were not so well established by the correspondence produced and by other circumstances, that a receiver with the duty of preserving the property of the corporation ought to be appointed.

> "We express no opinion upon the merits, or apparent merits, of the controversy. We are of the opinion that the injunction granted was too broad, and should have been limited to restraining the trustees and all others interested from a foreclosure of the mortgage, upon condition, however, that complainants secure eventual payment of the debts secured by the mortgage, if found to be valid debts of the corporation. Likewise, the order appointing the receiver should have confined him to preservation merely of the assets of the corporation."

It will be noted that the action in the Town case was a creditors' bill, and that it came under the well established rule whereby, in the case of a deadlock in the board of directors or rival claims of office it becomes necessary to protect the assets on behalf of the creditors, the court may appoint a receiver. There are no such facts in the case at bar.

U. S. Shipbuilding Co. v. Conklin, 126 Fed. 132, merely holds that a receiver may be appointed to preserve the assets of an *insolvent* corporation. We have no quarrel with that rule. The same rule is laid down by Section 564, Subdivision 5, of the Code of Civil Procedure of California. There is no allegation in the bill herein that the defendant corporation is insolvent.

Zeckendorf v. Steinfeld, 225 U. S. 445.

This was an Arizona case, but the statutory provisions as to receivers in that state are not set out. However, the appointment of a receiver was apparently only sustained "in view of the situation of the property *and the final winding up of the company.*"

It clearly appears that the above cases fall in two classes, those where the corporation is alleged to be in-

solvent and those cases where it has ceased to function or the object is incapable of fulfillment.

Dissolution.

We come now to the question of dissolution. Many of the cases above cited refer to this subject, and plainly indicate that the bill of complaint does not state a cause of action for dissolution. The dissolution of a corporation is regulated by statute in California, and there is no power in the court to compel a dissolution, except in accordance with the provisions of the statute. There are only two methods provided by law for involuntary dissolution: One under Section 358 of the Civil Code, which in part reads as follows:

> "If a corporation does not organize and commence the transaction of its business, or the construction of its works within one year from the date of its incorporation, or if, after its organization and commencement of its business, it shall lose or dispose of all of its property, and shall fail for a period of two years to elect officers and transact, in regular order, the business of said corporation, its corporate powers shall cease, and the said corporation may be dissolved at the instance of any creditor of the said corporation, at the suit of the state, on the information of the attorney general, but the resumption of its business in good faith by such corporation prior to the commencement thereof shall be a bar to such suit,"

and the other under the provisions of Section 803, *et seq.*, of the Code of Civil Procedure. Section 803, C. C. P., reads as follows:

> "Action may be brought against any party usurping, etc., any office or franchise. An action may be

brought by the attorney general, in the name of the people of this state, upon his own information, or upon a complaint of a private party, against any person who usurps, intrudes into, or unlawfully holds or exercises any public office, civil or military, or any franchise, or against any corporation, either *de jure* or *de facto*, which usurps, intrudes into, or unlawfully holds or exercises any franchise, within this state. And the attorney general must bring the action, whenever he has reason to believe that any such office or franchise has been usurped, intruded into, or unlawfully held or exercised by any person, or when he is directed to do so by the governor. (Amendment approved 1907; Stats. 1907, p. 600.)"

It is obvious that the bill does not bring the case at bar within either of these sections.

Voluntary dissolution is provided for by Sections 1227-1235 of the Code of Civil Procedure. Sections 1227 and 1228, C. C. P., read as follows:

"Sec. 1227. CORPORATION, HOW DISSOLVED.—A corporation may be dissolved by the Superior Court of the county where its principal place of business is situated, upon its voluntary application for that purpose. (Amendment approved 1880; Code Amdts. 1880, p. 109.)

"Sec. 1228. APPLICATION FOR DISSOLUTION OF CORPORATION, WHAT TO CONTAIN.—The application must be in writing, and must set forth:

"1. That at a meeting of the stockholders or members called for that purpose, the dissolution of the corporation was resolved upon by a vote of two-thirds of the members or of the holders of two-thirds of the subscribed capital stock;

"2. That all claims and demands against the corporation have been satisfied and discharged. (Amendment approved 1907; Stats. 1907, p. 318.)"

In 7 Cal. Jur., at page 135, it is stated:

"The law provides for three methods of dissolution of a corporation, one by direct act of the Legislature, another by *quo warranto,* and a third by voluntary act of the corporation itself; and the rule is that a corporation can be dissolved only in the manner prescribed by statute. As the jurisdiction of the Superior Court to decree dissolution exists only by virtue of the statute, either at the suit of an individual or at the suit of the state, the court is limited by the provisions of the statute both as to the conditions under which a dissolution may be brought about, and as to the extent of the judgment which it may make in the exercise of this jurisdiction. A court cannot treat a corporation as already dissolved because its condition is such that it will be necessary or proper for it to institute proceedings for dissolution. And as ownership of property is not essential to the existence of a corporation, a transfer of all its property does not work a dissolution. But if a corporation loses or disposes of all its property and fails for a period of two years to elect officers and transact, in regular order, its business, it may be dissolved at the instance of any creditor at the suit of the state, on the information of the attorney general."

It, therefore, conclusively appears that the bill stated no cause of action for dissolution and upon that ground should be dismissed.

Reply to the Summary of the Bill of Complaint, as Set Forth in Appellant's Opening Brief, Page 4.

(1) CHARGE OF "FRAUD":

We find no charge of fraud in the bill. Paragraph 10 of the bill sets up certain cancellation of indebtedness, and

the voting of certain sums to Lathrop and Gridley. The only allegation is that "neither said Lathrop nor Mrs. Gridley had rendered said corporation any services whatsoever to justify said payments." There is no allegation that there was no other consideration for these payments, and so far as appears by the bill, these payments were made for a valuable consideration of some sort other than services. In any event, it is not alleged that these payments were fraudulently made, or that they were not made in good faith. For instance, the payment of a salary of $250.00 per month to the president of a corporation that increased its assets from practically nothing to $600,000.00 would not seem to present any of the earmarks of a transaction which should occasion a court of equity to throw a corporation into the hands of a receiver, ruin its credit and wreck it, particularly in view of the fact that the president to whom the salary was paid has since died and left a goodly portion of her assets to the very people who, it appears from the testimony of Stillwell, are behind the scenes in this action.

The other transaction which is questioned by the appellant (and very indefinitely and inadequately questioned, as a matter of pleading), is that of a loan to Pacific Land and Cattle Company. There is no allegation that this loan was not for the benefit of Consolidated Water Company, or that the cattle company is insolvent, or that it is not amply able to answer an immediate call for its return; nor is there any allegation that any demand has ever been made by anybody that the loan be repaid. In the absence of such allegations, it must be presumed that this transaction was for the benefit of Consolidated

Water Company, and was not fraudulent. It must be presumed also that Pacific Land and Cattle Company is ready, willing and able to return the money. There is no allegation of fact in this bill indicating that the defendant corporation cannot continue to do business, that its profits have been absorbed, dissipated, or that the definite items in dispute cannot be litigated and determined in a proper action for that purpose.

It must be remembered that the board of directors of a corporation has discretion in the conduct of the business of the corporation.

Cal. Jur. Corporations, 528;

Fox v. Hale & Norcross Silver Mining Co., 108 Cal. 369, 426.

At most, the transactions are merely voidable and notice and demand on directors are prerequisite to suit. However, this is an action for receiver and dissolution and not an action to set these transactions aside.

This is not an action to compel the payment of dividends. If there is complaint that profits were reinvested in the business and that since the sale of the property dividends have not yet been distributed, plaintiff is at liberty to bring a suit to compel such dividends, but the allegations with respect to dividends have no place in this bill and state no cause of action.

Mulchay v. Hibernian Savings and Loan Society, 144 Cal. 219;

Zellerbach v. Allenburg, 99 Cal. 57.

Mismanagement:

As stated above, the salaries paid to the appellee Lathrop and to Mrs. Gridley were very modest in view of the admitted success of their efforts.

Betrayal of Trust in Refusal to Vote Stock of the Gridley Estate as the Interests of the Owners, the Legatees, Required and as They Demanded:

Of course, it would have done no good for these shares to have been voted as demanded, as it clearly appears that the demanders did not own two-thirds of the stock of the corporation, and in view of the allegations of the bill, that there were but five thousand shares of stock, of which Lathrop and his associates are conceded to have owned at least 2397½ shares, it is quite obvious that the two-thirds vote, required under section 1228 of the Code of Civil Procedure of California for voluntary dissolution, could not have been obtained, regardless of how Lathrop voted the stock in question. Therefore, his refusal was immaterial. Of course, as an executor he had the legal right to use his own judgment as to what was or what was not to the interests of the estate. The legatees were not stockholders of record, and had no voice in the matter.

(2) Sale oe corporate assets.

There are allegations concerning the sale of the water plant at Pomona. While under the law of this state, as hereinafter set forth, it would make no difference, it is apparently the theory of the plaintiff that this plant having been sold the corporation should be dissolved. It appears from the allegations in the bill that the stockholders of Consolidated Water Company originally had a very small investment and that under the management of appellee G. A. Lathrop the assets of the corporation grew to the amount of eight hundred thousand dollars (Complaint, Par. VIII), and that the profits were in ex-

cess of fifty thousand dollars per annum. It can be reasonably inferred from the growth of assets that the profits of the concern were reinvested in extensions and improvements, in pumping plants and pipe lines—the usual course of affairs in a growing community. However, regardless of these facts, the contention of plaintiff falls of its own weight. It is difficult to determine whether or not the plaintiff is complaining of the sale of this property for eight hundred thousand dollars. We do not see how he can complain of it and ask the court to affirm it by distributing the results thereof to the stockholders. Some mention is made that the stockholders of the company were not asked to approve the sale, the theory being that the approval was required under Sec. 361-a of the Civil Code. Before answering this contention let us remark that Sec. 361-a of the Civil Code refers only to the transfer of "business, franchise and property, as a *whole.*" Now assuming that this was a purported transfer of all the property as a whole and the approval of the stockholders had not been had, the transfer would have been void. In other words there would have been no transfer and the proper action of the plaintiff would be a stockholders bill joining the city of Pomona in a suit to declare the transfer void and tendering to the city of Pomona the return of the consideration paid to Consolidated Water Company. Section 361-a of the Civil Code provides:

> "361-a. Transfer of franchise of corporation not valid without consent of stockholders. No sale, lease, assignment, transfer or conveyance of the business, franchise and property, *as a whole,* of any corporation now existing, or hereafter to be formed in this state, shall be valid without the consent of stockholders thereof, holding of record at least two-

thirds of the issued capital stock of such corporation; such consent to be either expressed in writing, executed and acknowledged by such stockholders, and attached to such sale, lease, assignment, transfer or conveyance, or by vote at a stockholders' meeting of such corporation called for that purpose; but with such assent, so expressed, such sale, lease, assignment, transfer, or conveyance shall be valid; *provided, however, that nothing herein contained shall be construed to limit the power of the directors of such corporation to make sales, leases, assignments, transfers or conveyances of corporate property other than those hereinabove* set forth."

There is no allegation in the bill that the property transferred to the city of Pomona was all of the property of the corporation and all of its franchises and right to do business. Indeed the contrary appears. Paragraph XIV limits the action of the Board of Directors to that "employed and used in furnishing water to the inhabitants of San Jose Township and vicinity and to the inhabitants of the city of Pomona", and paragraph XV refers to an application to the Railroad Commission "to sell the water system, rights, plant, business and *substantially* all of the property of said corporation to the city of Pomona." In the same paragraph is set out the title to the Railroad Commission application, confining the matter to "its water system."

Paragraph XVI referring to bills of sales and conveyances to the city of Pomona confines the property transferred to that "employed in furnishing water as aforesaid" and to the "working capital and assets of said corporation, whereby it *carried on said water business.*" Similar references are contained in paragraphs XVII and XVIII

of the bill. The bill is careful not to say that the business, franchise and property *as a whole* have been disposed of, and it affirmatively appears that if there were an attempt to dispose of the business, franchise and property as a whole it would be an abortive attempt, because, as alleged in the bill, the stockholders have not approved any such transaction and therefore the corporation would still own the property and it would be incumbent upon the Board of Directors to continue the conduct of the business. The fact is plainly inferred by the bill that there are other property and other rights belonging to this corporation and the corporation must continue to exist for the purpose of handling and conducting them.

Dial v. Homestead Land Co., 39 Cal. App. 480;
Thompson on Corporations, 3rd Ed. Sec. 4562;
C. C. 361;
Bradford v. Sunset Land Co., 30 Cal. App. 87.

(3) THE PURPOSE FOR WHICH THE CORPORATION WAS FORMED HAS BEEN ACCOMPLISHED.

There is no allegation in the bill that the furnishing of water is or was the *sole* purpose of the corporation. And counsel very well know that no such allegation can be incorporated in the bill. If the sale to the city of Pomona had included all of the corporation assets, it would have been void according to the law of this state. The fact that not all of the assets but a *portion* of them admittedly was sold (a sale which, under the laws of California, this California corporation had a right to consummate), makes the transaction legal, and the approval of the stockholders was not required. It seems, however, that appellant is perfectly willing to ratify this

sale by asking that a portion of the proceeds be paid to him. Under these conditions, he cannot be heard to utilize such transaction as ground for receiver, dissolution or other intervention of a court of equity. It is not alleged that this sale was an unprofitable one; on the contrary, it crystallized the profits of the corporation into a gain of $600,000.00, admittedly under the skill and management of Lathrop. If appellant is to treat this sale as void, then his remedy is to join the city of Pomona as a defendant in an action to compel a redelivery of the property and a repayment to the city of Pomona of the $831,000.00 received. But plaintiff is careful not to reflect upon the propriety of this sale as a business transaction negotiated by Lathrop for the benefit of the corporation and its stockholders. Of course, appellant and the other stockholders represented by counsel, aggregating all told less than three per cent. in stock ownership, do not want to void this sale. They challenge it merely in an unfair endeavor to put Lathrop, the man who created this entire valuation, in the wrong upon some technicality. If in good faith they wanted to challenge this transaction they could have done so by a suit in which the city of Pomona was joined. It was certainly as easy to bring that suit as this one.

Paragraph XI is entirely too general, and a court of equity should not be compelled to reach out its arm and take the burden of investigation of this kind in view of the fact that any stockholder has the right to examine the books. A stockholder should not unnecessarily demand the interposition of courts of equity. Before putting this burden upon the time of the court and the already overburdened judicial machinery, the stockholder should

at least examine the books and see what he can find out himself and make his allegations accordingly. There is no statement in the bill that the appellant has personally or through an agent looked over the books of the corporation and that he had discovered certain facts upon which he bases the bill, or for reasons stated was unable to discover the facts. (Civil Code, Sections 377, 378.)

(4) THAT DEFENDANT LATHROP IS ATTEMPTING TO EMBARK THE CORPORATION IN A NEW AND DIFFERENT LINE OF BUSINESS.

In view of the fact that there is no allegation in the complaint that the sole purpose of the corporation was to supply the city of Pomona with water, it cannot be contended that the appellee Lathrop is embarking in a new and different line of business not contemplated by the stockholders. The allegation that there was an intention to change the purposes of the corporation states no cause of action and has no bearing upon any purported cause of action.

Under section 362 of the Civil Code, a corporation has the right to amend its articles as to purposes. This section provides:

> "Amendment of articles of incorporation. Amended articles filed with secretary of state. Any corporation organized under the laws of this state may amend its articles of incorporation for any or all of the following purposes:
>
> (1) * * *
>
> (2) To alter or repeal any provision appearing in its original or amended articles of incorporation relative to the purposes for which the corporation is

formed, or to set forth additional powers or purposes.

(3) * * * " *etc.*

(5) THE PLAINTIFF HAS DEMANDED OF APPELLEES THAT STEPS BE TAKEN TO WIND UP THE CORPORATION.

The allegation in the complaint has to do with the efforts made in behalf of appellant by Mr. Austin to obtain a voluntary dissolution of the corporation. These efforts were unavailing and have no place in this bill, and have no bearing upon an action brought for involuntary dissolution.

(6) THAT THE CORPORATION IS NOT BEING MANAGED OPERATED OR CONTROLLED IN THE INTERESTS OR FOR THE BENEFIT OF THE STOCKHOLDERS.

The history of this corporation, as alleged in the bill, shows that starting with almost nothing the profits were accumulated and reinvested and preserved for the stockholders.

The assets of the corporation, as admitted by the appellants, amount to more than $600,000.00.

In conclusion, we quote the summing up of the holdings of the Federal Courts by Judge Morris of the District of Delaware in the case of Myers v. Occidental Oil Corporation, 288 Fed. 997, 1003.

> "Moreover, it must be observed that judicial statements to the effect that a receivership may properly be constituted, although the legitimate purposes of a corporation may not have become impossible of accomplishment, if the facts clearly disclose *such fraudulent, willful or reckless mismanagement* of its business and affairs by its board of directors as to

produce a conviction that further control of the corporation by the same board would result in the *destruction of its business and insolvency,* or cause great and unnecessary loss to its creditors or stockholders, but made in suits in which receivership is not the primary object, as in United States Shipbuilding Co. v. Conklin, *supra,* and Carson v. Allegany Window Glass Co. (C. C.) 189 Fed. 791, 796, are not authority in support of the contention that receivers may be so appointed without regard to the nature or ultimate object of the suit in which receivers are sought."

* * * * * * * * *

"If, however, this court is without power in this suit to sell and distribute the corporate assets, receivers may not be appointed to aid in so doing. That this court has such power in receiverships under the Delaware statute is clear. Jones v. Mutual Fidelity Co. (C. C.) 123 Fed. 506; Carson v. Allegany Window Glass Co. (C. C.) 189 Fed. 791. But, the allegation of insolvency not having been established, the statutory power is not here available. The great weight of authority is to the effect that its inherent jurisdiction does not enable a court of equity, at the instance of a stockholder, to dissolve or wind up a corporation by the sale and distribution of all its assets, because of the mismanagement or fraud of its officers and stockholders. 39 L. R. A. (N. S.) 1032, note. In Vila v. Grand Island E. D. I. & C. S. Co., 68 Neb. 222, 97 N. W. 613, 110 Am. St. Rep. 400, 4 Ann. Cas. 59, an ably considered case, the court, quoting from Wallace v. Pierce-Wallace Pub. Co., 101 Iowa, 313, 70 N. W. 216, 38 L. R. A. 122, 63 Am. St. Rep. 389, said:

'It is certainly true that, in the absence of express statutory authority, jurisdiction of courts of

> equity does not exist over corporate bodies to such an extent as to justify them in dissolving corporations or in winding up their affairs and sequestrating their property. This seems to be so well settled that there is scarcely a dissenting voice in authority.' "

There is an enlightening note in *L. R. A. New Series, Vol. 39, at p. 1032, et seq.* We will not quote this note at length but under the heading "I. General Rule," the following statement is made:

> "The general rule has been asserted that corporations are the creatures of the state, hence, in general, their life depends upon the action of the state or the stockholders as a whole; and especially if a going concern whose charter or franchise has not yet expired, they cannot, in the absence of statute, be dissolved at the instance of a stockholder by an action in equity for that purpose, and therefore equity is without jurisdiction of a suit by a stockholder, the principal purpose of which is to wind up the affairs of the corporation or to have a receiver appointed with that end in view."

The authorities as indicated by this note are overwhelmingly against the position of plaintiff in this suit and plaintiff's endeavors to bring itself within the confines of some exception is obviously unsupported by the facts alleged, by any principle of equity or by any appropriate authority.

We submit that courts do not look with favor upon complaints emanating from stockholders representing an infinitesimal percentage of the stock who apparently have not even taken the trouble to have access to the books of the corporation, who have not attempted any adjustment or arbitration of difficulties out of court in

so far as the transactions of the officers of the corporation are concerned, and who come into court at the instigation of one who has no interest in the corporation other than sharing in a fee for wrecking it. There is no doubt of the general rule as shown by cases which we have cited that where the conduct of the directors or their failure to act is such that the corporation is at a standstill and cannot function as such, the courts of equity will interpose and preserve the assets when absolutely necessary to do so.

There is no such situation in this case. On the contrary, the defendants desire to proceed and to conduct the business of the corporation and to keep it alive, and the assets are in no wise endangered. There is no insolvency either on the part of the corporation or of G. A. Lathrop. Far from it. Nor is there any creditor whose rights are sought to be preserved, nor is there any inaction on the part of the directors.

The plaintiff merely appears as a stockholder prosecuting a stockholder's bill for the benefit of the corporation. Under the authorities, assuming the facts to be as alleged in the bill, the plaintiff should have brought an action against Lathrop to compel restitution to the corporation of misappropriated funds. Instead, plaintiff predicates his cause of action upon an alleged right to compel the dissolution of the corporation. This being so, the case comes directly within the case of Cashman v. Amador, *supra*. In the Cashman case, Cashman appeared as plaintiff for the benefit of the county. In the case at bar, Swan appears as plaintiff for the benefit of the corporation. Cashman was not entitled to personal relief in that case; Swan is not entitled to personal relief

in this case. Therefore, this plaintiff has no right to have his cause of action adjudicated in this court.

Under the authorities cited, it is clear that the decree of the District Court, dismissing the Bill of Complaint herein "upon the ground that there is insufficiency of fact to constitute a valid cause of action in equity" was proper and should be affirmed.

Respectfully submitted,

KEMPER CAMPBELL,
CHAS. L. NICHOLS,
Attorneys for Appellees.

No. 5480

United States

Circuit Court of Appeals

For the Ninth Circuit.

LUTHER WEEDIN, United States Commissioner of Immigration, District No. 28,

Appellant,

vs.

ERICH PAUL HANS HEMPEL,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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806 Dexter Horton Building, Seattle, Washington. [1*]

In the United States District Court for the Western District of Washington, Northern Division.

No. 12,043.

ERICH PAUL HANS HEMPEL,

Petitioner,

vs.

LUTHER WEEDIN, United States Commissioner of Immigration District No. 28,

Respondent.

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*Page-number appearing at the foot of page of original certified Transcript of Record.

PETITION FOR WRIT OF HABEAS CORPUS.

Comes now the petitioner by his attorneys, Patterson & Ross, and complains of the respondent and for cause of action alleges:

I.

That petitioner is a resident of the city of Seattle, King County, Washington.

II.

That the respondent is the United States Commissioner of Immigration for District No. 28, with headquarters at Seattle, Washington.

III.

That on the 15th day of April, 1927, a warrant of arrest was issued for petitioner, an alien, charging that he was found in the United States in violation of the Immigration Act of February 5, 1917, for the following reasons:

1. That he was a person likely to become a public charge at the time of his entry.

2. That he has been convicted of or admits the commission of a felony or other crime or misdemeanor involving moral turpitude, to wit: theft, prior to his entry to the United States. [2]

That a hearing was had and the testimony of the alien, and the alien alone, was taken and reduced to writing. That the original record thereof is now in Washington, D. C., in the office of the Honorable Secretary of Labor, and the copies thereof are in the possession of and under the control of the Im-

migration Officers of the United States and are not available to your petitioner.

IV.

That the board of inquiry before which said hearing was had found that the charges contained in the warrant were sustained and certified the record of said hearing to the Honorable Secretary of Labor and recommended that said alien, your petitioner, be deported.

V.

That thereafter your petitioner appealed from the finding of the said Board of Inquiry to the Honorable Secretary of Labor and that the Honorable Secretary of Labor has found upon consideration of aforesaid record that the said alien, your petitioner, is in the United States in violation of law, that he was a person likely to become a public charge at the time of his entry; and that he has been convicted of or admits the commission of a felony or other crime or misdemeanor involving moral turpitude, to wit: theft, prior to his entry into the United States, and the Honorable Secretary of Labor has issued his warrant directing the deportation of your petitioner. That the Immigration Officers refuse to give a copy thereof to your petitioner.

VI.

That the respondent now has your petitioner in custody by virtue of said warrant and by virtue of said warrant threatens to remove your petitioner

from this district on the 23d day of [3] November, 1927, in execution thereof.

VII.

That as and for the reason hereinbefore set forth your petitioner is unable to set forth a copy of the record of the testimony taken and received before the Board of Inquiry with reference to the charges above mentioned against your petitioner and therefore alleges that the following is the substance of all of said testimony:

(a) There was no evidence adduced to sustain the first charge; that on the contrary an affirmative showing was made by your petitioner to the following effect: The alien reached the United States on the 16th day of November, 1923; that he immediately came to Seattle where he has resided ever since. The testimony shows he had $50.00 in cash when he reached this country and his father had executed a guaranty that he would not become a public charge. He went immediately to Seattle, and promptly entered the business college for the purpose of learning the English language and to take up bookkeeping. He remained with the college about one year. He then went to the Y. M. C. A. College for nine months and from there he went to the University of Washington. At the Y. M. C. A. he studied English, French and algebra, and at the University of Washington took up a course in pharmacy, where he remained for two quarters, and then having been married he went to work as clerk in a hotel where he was employed

for three months. Shortly after quitting that job he accepted a position with the Pacific Westbound Conference where he worked two months. From that position he went to work in the office of the Eagles Lodge of Seattle, where he is now employed. All this time he was a man in perfect health, and the above is all of the evidence adduced on said charge.

(b) The evidence bearing on the second charge was [4] as follows: That in 1920 he was convicted of theft, he received a sentence of two years, but at the end of eighteen months was pardoned and then made full restitution. He then secured work and had no further trouble in his country. That he continued employed thereafter until he left Germany for the United States, a period of about sixteen months. That in May, 1923, your petitioner applied to the American Consul-General at Berlin for a visé of petitioner's passport and at said time made a full disclosure of the record of conviction against your petitioner as above mentioned. That thereupon the American Consul-General informed your petitioner that it would be necessary for the latter to furnish documentary evidence concerning the disposition of your petitioner's case. That thereafter your petitioner renewed his application and submitted with his renewed application documentary evidence of the pardon that had been granted him as the final disposition of said case. That upon said documentary evidence being presented to said American Consul-General and upon investigation made by said American Consul-Gen-

eral, your petitioner's passport was viséed and he was placed in the quota for emigration to the United States. And your petitioner then came to the United States and was admitted by the United States Immigration Authorities at New York.

That in addition to the testimony of your petitioner he offered in evidence certificates of good character and industry covering the period of his residence in the United States, and evidence of his declaration to become a citizen of the United States. [5]

VIII.

That on said hearing your petitioner was unable to produce documentary proof of the aforesaid pardon, but stated to said Board of Inquiry that if given time could procure the same. That your petitioner now has in his possession the said documentary evidence of said pardon in the form of a certificate from the Justice Head Secretary of the Land Court at Frankfort-on-Oder, the officer having custody of said record. That your petitioner has on the 31st day of October, 1927, requested of the Secretary of Labor of the United States, a rehearing for the purpose of producing said proof of pardon, and said petition for rehearing has been denied.

IX.

That by reason of the matters and things herein alleged your petitioner is entitled to remain in the United States; that he has not been accorded a fair hearing and that the evidence adduced at said hear-

ing was not sufficient upon which to base an order and warrant of deportation.

That your petitioner is illegally restrained of his liberty and therefore prays:

An order of this Court directing the Clerk to issue out of and under the seal of this Court a writ of habeas corpus directed to Luther Weedin, United States Commissioner of Immigration of District No. 28, commanding him to have the body of your petitioner before this Court at a time and place to be fixed therefor, and then and there show cause, if any he have, why your petitioner should be further restrained of his liberty, and to receive such further orders as the Court may make in the premises.

PATTERSON & ROSS,
Attorneys for Petitioner.

806 Dexter Horton Building, Seattle, Washington.

[6]

State of Washington,
County of King,—ss.

Erich Paul Hans Hempel, being first duly sworn, on his oath deposes and says: That he is the petitioner above named; that he has read the foregoing petition, knows the contents thereof and that the same is true.

ERICH PAUL HANS HEMPEL.

Subscribed and sworn to before me this 22 day of November, 1927.

[Seal] BERT C. ROSS,
Notary Public in and for the State of Washington,
Residing at Seattle.

[Endorsed]: Filed Nov. 23, 1928. [7]

[Title of Court and Cause.]

ORDER TO SHOW CAUSE.

The above-entitled matter coming on for hearing this 22 day of November, 1927, upon the petition of Erich Paul Hans Hempel, for a writ of habeas corpus, and upon statement by counsel, and the Court being fully advised in the premises,—

IT IS HEREBY ORDERED that Luther Weedin, United States Commissioner of Immigration of District No. 28, be and he is hereby required to be and appear in the above-entitled court at ten o'clock in the forenoon, Saturday, November 26th, 1927, in the city of Seattle, King County, or as soon thereafter as convenient for the Court, to then and there show cause, if any there be, why a writ of habeas corpus should not issue in the said matter as prayed for in the petition herein filed, and why the petitioner should not be discharged from custody.

This order and the petition on which it is based to be served on the respondent Luther Weedin, United States Commissioner of Immigration, by

this day delivering to him or one of his assistants a copy of the order and petition, the petitioner to forthwith deposit with the Clerk of this court $50.00 to defray any additional expense incurred in the detention of petitioner by respondent pending the final determination of this matter.

Done in the chambers of this court at Tacoma, this 22d day of November, 1927, at Tacoma, Wash.

EDWARD E. CUSHMAN,
Judge.

[Endorsed]: Filed Nov. 23, 1927. [8]

[Title of Court and Cause.]

RETURN TO ORDER TO SHOW CAUSE.

To the Honorable EDWARD E. CUSHMAN, Judge of the District Court of the United States for the Western District of Washington:

Comes now the respondent, Luther Weedin, United States Commissioner of Immigration at Seattle, Washington (District No. 28), and, for answer and return to the order to show cause entered herein, certifies that the said Erich Paul Hans Hempel was duly arrested by an immigrant inspector under authority of a warrant of arrest issued by the Secretary of Labor April 15, 1927, charging that the said Erich Paul Hans Hempel had been found in the United States in violation of the Immigration Act of February 5, 1917, for the following among other reasons: That he was

a person likely to become a public charge at the time of his entry; and that he had been convicted of or admitted the commission of a felony or other crime or misdemeanor involving moral turpitude, to wit: theft, prior to entry into the United States; that the said Erich Paul Hans Hempel was thereafter accorded a hearing before an immigrant inspector, at which time *had* was afforded an opportunity to show cause why he should not be deported; that, as a result of said hearing, a deportation warrant was issued by the Secretary of Labor July 7, 1927, commanding that the said Erich Paul Hans Hempel, who landed at the port of New York, N. Y., ex *XX* "President Roosevelt" on the 16th day of November, 1923, be returned to Germany—the country whence he came—for the reasons set forth above contained in the warrant of arrest; that the said Erich Paul Hans Hempel was at liberty under bond of $1,000 from April 16, 1927, until November 22, 1927; that, since the latter date respondent has held, and now holds and detains, the said Erich Paul Hans Hempel for deportation from the United States as an alien person not entitled to be and remain in the United States [9] under the laws of the United States, and subject to deportation under laws of the United States.

The original record of the Department of Labor in the deportation proceedings against Erich Paul Hans Hempel is hereto attached and made a part and parcel of this return, as fully and completely as though set forth herein in detail.

WHEREFORE, Luther Weedin, United States Commissioner of Immigration at Seattle, Washington (District No. 28), who makes this return, prays that the petition for a writ of habeas corpus be denied.

LUTHER WEEDIN.

United States of America,
Western District of Washington,
Northern Division,—ss.

Luther Weedin, being first duly sworn, on oath deposes and says: That he is United States Commissioner of Immigration at Seattle, Washington (District No. 28), and the respondent named in the foregoing return; that he has read the foregoing return, knows the contents thereof and believes the same to be true.

LUTHER WEEDIN.

Subscribed and sworn to before me this 2d day of December, 1927.

[Seal] D. L. YOUNG,
Notary Public in and for the State of Washington,
Residing at Seattle, Washington.

[Endorsed]: Received a copy of the within ——— this 5 day of Dec., 1927.

PATTERSON & ROSS,
Attorneys for Petitioner.

[Endorsed]: Filed Dec. 5, 1927. [10]

[Title of Court and Cause.]

MEMORANDUM DECISION.

After Hearing, on Petition for Writ of Habeas Corpus.

Filed January 23, 1928.

PATTERSON & ROSS, Seattle, for Petitioner.

THOS. P. REVELLE, U. S. Attorney, and ANTHONY SAVAGE, Asst. U. S. Attorney, Seattle, for Respondent.

CUSHMAN (D. J.).—In April, 1927, petitioner was, upon a warrant of the Assistant Secretary of Labor, arrested, the charge being that he was found in the United States in violation of the Immigration Act of February 5, 1917. In May, after a hearing conducted by an Immigrant Inspector in which the only testimony taken was that of the petitioner, his deportation was recommended. In June a board of review made the following recommendation:

> " * * * This alien, male, aged 37, married, native and citizen of Germany, of the German race, arrived at New York November 16, 1923, ex SS. 'President Roosevelt' and was admitted on primary inspection. He has been released on bond. Alien was granted a hearing at Seattle, Washington, May 4, 1927, by Immigrant Inspector Joseph H. Gee.
>
> This case came to the attention of the Immigration Service through information by a representative of the staff of the German Consul

General at Seattle who reports that alien had been convicted of embezzlement in Germany. Alien admits that he was convicted for misappropriating money but he claims that he restored all money he took and was pardoned after serving eighteen months. He also claims that he told the American Consul in Berlin of his conviction and pardon prior to the issuance of his visa. Even though the alien's statement that he has been pardoned be true, yet under the decision of the court in the case of [11] United States ex rel. Palermo vs. Smith, 17 Fed. (2d) 534, the alien is subject to deportation. In the case cited the Circuit Court of Appeals held that that part of Section 19 of the Immigration Act of 1917 exempting from deportation those aliens who had been convicted of crimes involving moral turpitude and were later pardoned only applied to aliens who had been convicted in this country and pardoned. In view of this fact, and the admission of the alien that he has been convicted abroad, deportation appears mandatory.

Considered and recommended that alien be deported to Germany at the expense of the Steamship Company, on the grounds:

That he is in the U. S. in violation of the Act of February 5, 1917, in that he has been convicted of or admits having committed a felony or other crime or misdemeanor involving moral turpitude prior to entry into the

> United States, to wit: theft; and that he was a person likely to become a public charge."

Upon the foregoing report petitioner's deportation was ordered by the Assistant to the Secretary. A rehearing was asked by the petitioner to introduce documentary evidence of his pardon of the offense committed by him in Germany, which rehearing was denied, and the petitioner is held for deportation. Upon the return of the order to show cause why a writ of habeas corpus should not issue discharging petitioner, a certificate showing full pardon of such offense was introduced. The fact of such pardon has not been questioned. The sole question for decision, is as to the effect of the pardon. This is shown by the recommendation of the board of review. Sec. 4289¼jj, provides for the deportation of:

> " * * * except as hereinafter provided, any alien who is hereafter sentenced to imprisonment for a term of one year or more because of conviction in this country of a crime involving moral turpitude, committed within five years after entry of the alien to the United States, or who is hereafter sentenced more than once to such a term of imprisonment because of conviction in this country of any crime involving moral turpitude, committed at any time after entry; * * * any alien who was convicted, or who admits the commission, prior to entry, of a felony or other crime or misdemeanor involving moral turpitude; * * * ."

The second proviso of Sec. 19 of the Immigration Act of February 5, 1917, 39 Stat. at large, Chap. 29, pp. 874, [12] 889, 890, Comp. Stat., Supp. 1919, Sec. 4289¼jj, provides:

> " * * * Provided further, That the provision of this section respecting the deportation of aliens convicted of a crime involving moral turpitude shall not apply to one who has been pardoned, nor shall such deportation be made or directed if the court, or judge thereof, sentencing such alien for such crime shall, at the time of imposing judgment or passing sentence or within thirty days thereafter, due notice having first been given to representatives of the State, make a recommendation to the Secretary of Labor that such alien shall not be deported in pursuance of this Act."

Respondent's contention is:

> " * * * The entire context of the second proviso shows plainly that it relates solely to aliens convicted of crimes committed after entry into the United States, and has no application to the 10th clause of the section. In this connection attention is invited to the opinion of the Circuit Court of Appeals for the Second Circuit, in the case of United States ex rel. Palermo vs. Smith, decided February 7, 1927. (17 Fed. (2d) 534.)"

Petitioner cites: Mast vs. Stover etc., 44 L. Ed. 856, at 858; 20 R. C. L. 556; Ex parte Garland, 18 L. Ed. 366; Young vs. United States, 24 L. Ed.

" * * * The Constitution provides that the President 'shall have power to grant reprieves and pardons for offences against the United States, except in case of impeachment.' The power thus conferred is unlimited, with the exception stated. It extends to every offence known to law, and may be exercised at any time after its commission, either before legal proceedings are taken, or during their pendency, or after conviction [14] and judgment. * * *

Such being the case, the inquiry arises as to the effect and operation of a pardon, and on this point all the authorities concur. A pardon reaches both the punishment prescribed for the offence and the guilt of the offender; and when the pardon is full, it releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offence. If granted before conviction, it prevents any of the penalties and disabilities consequent upon conviction from attaching; if granted after conviction, it removes the penalties and disabilities, and restores him to all his civil rights; it makes him, as it were, a new man, and gives him a new credit and capacity.

There is only this limitation to its operation: it does not restore offices forfeited, or property or interests vested in others in con-

sequence of the conviction and judgment.
* * *

The effect of this pardon is to relieve the petitioner from all penalties and disabilities attached to the offence of treason, committed by his participation in the Rebellion. So far as that offence is concerned, he is thus placed beyond the reach of punishment of any kind. But to exclude him, by reason of that offense, from continuing in the enjoyment of a previously acquired right, is to enforce a punishment for that offence notwithstanding the pardon. If such exclusion can be effected by the exaction of an expurgatory oath covering the offence, the pardon may be avoided, and that accomplished indirectly which cannot be reached by direct legislation. It is not within the constitutional power of Congress thus to inflict punishment beyond the reach of executive clemency. From the petitioner, therefore, the oath required by the Act of January 24th, 1865, could not be exacted, even if that act were not subject to any other objection than the one stated."

In Burdick vs. United States, 236 U. S. 79, it was held that the acceptance of a pardon was essential to its validity, but it has been held this is not true in all cases. Biddle vs. Perovich, decided by the Supreme Court May 31, 1927. In the latter case it was said:

"A pardon in our days is not a private act of grace from an individual happening to

possess power. It is a part of the Constitutional scheme. When granted it is the determination of the ultimate authority that THE PUBLIC WELFARE will be better served by inflicting less than what the judgment fixed. See Ex parte Grossman, 267 U. S. 87, 120, 121. Just as the original punishment would be imposed without regard to the prisoner's consent and in the teeth of his will, whether he liked it or not, the PUBLIC WELFARE, not his consent determines what shall be done. So far as a pardon legitimately cuts down a penalty it AFFECTS the JUDGMANT imposing [15] it. No one doubts that a reduction of the term of an imprisonment or the amount of a fine would limit the sentence effectively on the one side and on the other would leave the reduced term or fine valid and to be enforced, and that the convict's consent is not required."

(Italics those of this Court.)

In Ex parte Grossman, 267 U. S. 87, in holding that the President may pardon a criminal contempt, it is said:

" * * * The Executive can reprieve or pardon all offenses after their commission, either before trial, during trial or after trial, by individuals, or by classes, conditionally or absolutely, and this without modification or regulation by Congress. Ex parte Garland, 4 Wall. 333, 380. * * *

Executive clemency exists to afford relief from undue harshness or evident mistake in the operation or enforcement of the criminal law. The administration of justice by the courts is not necessarily always wise or certainly considerate of circumstances which may properly mitigate guilt. To afford a remedy, it has always been thought essential in popular governments, as well as in monarchies, to vest in some other authority than the courts power to ameliorate or avoid particular criminal judgments. It is a check entrusted to the executive for special cases. * * * "

In Knote vs. United States, 95 U. S. 149, at 153 and 154, it was said:

"The effect of a pardon upon the condition and rights of its recipient have been the subject of frequent consideration by this court; and principles have been settled which will solve the question presented for our determination in the case at bar. Ex parte Garland, 4 Wall. 333; Armstrong's Foundry, 6 id. 766; United States vs. Padleford, 9 id. 531; United States vs. Klein, 13 id. 128; Armstrong vs. United States, id. 155; Pargoud vs. United States, id. 156; Carlisle vs. United States, 16 id. 147; Osborn vs. United States, 91 U. S. 474.

A pardon is an act of grace by which an offender is released from the consequences of his offence, so far as such release is practical and within control of the pardoning power,

been suggested. 'Comity' in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and goodwill, upon the other. But it is the recognition which one nation allows within its territory to the legislative, EXECUTIVE or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws. * * * "

(Italics those of this Court.)

In the present case the Court's attention has [17] not been directed to any treaty provision touching this identical question, or text writer discussing it.

In Bank of Augusta vs. Earle, 13 Peters, 519 at 589, the Court said:

" * * * The comity thus extended to other nations, is no impeachment of sovereignty. It is the voluntary act of the nation by which it is offered; and is inadmissible, when contrary to its policy, or prejudicial to its interests. But it contributes so largely to promote justice between individuals, and to produce a friendly intercourse between the sovereignties to which they belong, that courts of justice have continually acted upon it, as a part of the voluntary law of nations. It is truly said in Story's Conflict of Laws, 37, that 'IN THE SILENCE OF ANY POSI-

TIVE RULE, AFFIRMING OR DENYING, OR RESTRAINING THE OPERATION OF FOREIGN LAWS, COURTS OF JUSTICE PRESUME THE TACIT ADOPTION OF THEM BY THEIR OWN GOVERNMENT, UNLESS THEY ARE REPUGNANT TO ITS POLICY, OR PREJUDICIAL TO ITS INTERESTS. It is not the comity of the courts, but ascertained in the same way, and guided by the same reasoning by which all other principles of municipal laws are ascertained and guided.' "

(Italics those of this Court.)

In Hilton vs. Guyot, *supra,* page 166, the following from Wheaton is quoted with approval:

" * * * 'All the effect, which foreign laws can have in the territory of a State, depends absolutely on the express or tacit consent of that State. The express consent of a State, to the application of foreigners within its territory, is given by acts passed by its legislative authority, or by treaties concluded with other States. Its tacit consent is manifested by the decisions of its judicial and ADMINISTRATIVE AUTHORITIES, as well as by the writings of its publicists' * * * ."

(Italics those of this Court.)

At page 167, it is said:

"A judgment affecting the status of persons, such as a decree dissolving a marriage,

is recognized as valid in every country, unless contrary to the policy of its own law. Cottington's Case, 2 Swanston, 326; Roach vs. Garvin, 1 Ves. Sen. 157; Harvey vs. Farnie, 8 App. Cas. 43; Cheely vs. Clayton, 110 U. S. 701. It was of a foreign sentence of divorce, that Lord Chancellor Nottingham, in the House of Lords, in 1688, in Cottington's case, above cited, said: 'It is against the law of nations not to give credit to the judgments and sentences of foreign countries, till they can be reversed by law, and according to the form, of those countries wherein they were given. For what right hath one kingdom to reverse the judgment of another? And how can we refuse to let a sentence take place till it be reversed? And what confusion would follow in Christendom, [18] if they should serve us so abroad, and give no credit to our sentences.' ''

At page 214, it is said:

"Mr. Justice Cooley said: 'True comity is equality; we should demand nothing more, and concede nothing less.' McEwan vs. Zimmer, 38 Mich. 765, 769.''

After a review of the laws and decisions of various countries of the two Americas, of Europe and those of Egypt, it was said by the Court, at page 227:

"It appears, therefore, that there is hardly a civilized nation on either continent, which,

by its general law, allows conclusive effect to an executory foreign judgment for the recovery of money. In France, and in a few smaller States—Norway, Portugal, Greece, Monaca, and Hayti—the merits of the controversy are reviewed, as of course, allowing to the foreign judgment, at the most, no more effect than of being PRIMA FACIE evidence of the justice of the claim. In the great majority of the countries on the continent of Europe—in Belgium, Holland, Denmark, Sweden, Germany, in many cantons of Switzerland, in Russia and Poland, in Roumania, in Austria and Hungary (perhaps in Italy), and in Spain —as well as in Egypt, in Mexico, and in a great part of South America, the judgment rendered in a foreign country is allowed the same effect only as the courts of that country allow to the judgment of the country in which the judgment in question is sought to be executed.

The prediction of Mr. Justice Story (in Sec. 618 of his Commentaries on the Conflict of Laws, already cited) has thus been fulfilled, and the rule of reciprocity has worked itself firmly into the structure of international jurisprudence. The reasonable, if not the necessary, conclusion appears to us to be that judgments rendered in France, or in any other foreign country, by the laws of which our own judgments are reviewable upon the merits, are not entitled to full credit and conclusive

effect when sued upon in this country, but are PRIMA FACIE evidence only of the justice of plaintiff's claim."

The decision in this case was rendered in 1895. It will be seen from the foregoing decision that as to judgments, a different rule prevails in France than in Germany. In Hilton vs. Guyot, *supra,* the effect to be given to a judgment recovered in France, in a suit between private parties, was the matter being considered by the Court.

Speaking of the German rule, the Court said: [19]

Page 219, "In the Empire of Germany, as formerly in the States which now form part of that Empire, the judgment of those States are mutually executed; and the principle of reciprocity prevails as to the judgments of other countries, * * *

By the German Code of 1887, 'compulsory execution of the judgment of a foreign court cannot take place, unless its admissibility has been declared by a judgment of exequater'; 'The judgment of exequater is to be rendered without examining whether the decision is conformable to law'; but it is not to be granted if reciprocity is not guaranteed.' * * *

The Reichsgericht, or Imperial Court, in a case reported in full in Piggott, has held that an English judgment cannot be executed in Germany, because, the court said, the German courts, by the Code, when they execute foreign judgments at all, are 'bound to the unqualified

recognition of the legal validity of the judgments of foreign courts,' and 'it is, therefore, an essential requirement of reciprocity, that the law of the foreign State should recognize in an equal degree the legal validity of the judgments of German courts, which are to be enforced by its courts; and that an examination of their legality, both as regards the material justice of the decision as to matters of fact or law, and with respect to matters of procedure, should neither be required as a condition of *thie* execution, by the court EX OFFICIO, nor be allowed by the admission of pleas which might lead to it.' * * * "

As already pointed out, the Court in considering the scope and application of the rule or practice as to comity of nations, makes no distinction between judgments rendered by the courts of other nations, and the executive acts and administrative decrees of the authorities of such nations, pages 164 and 165; while a pardon is an executive act, it affects the judgment and the sentence; for, as stated in Ex parte Garland, *supra,* the pardon reaches "both the punishment prescribed for the offense, and the guilt of the offender."

In Second Russian Ins. Co. vs. Miller, 268 U. S. 552, at 560, a Russian ukase was being considered, and while it was denied effect in the particular case, the decision in no way limits any of the foregoing decisions. The reason for denying effect to it is stated as follows: .

> " * * * Certainly such an application of foreign [20] law to acts done within the territorial jurisdiction of the forum carries the principle of the adoption of foreign law by comity much beyond its limits as at present defined, the more so as the contract between a Russian and a German which we are asked to hold illegal on the basis of Russian law is shown by the expert testimony in the case to be valid according to the German law. The contention runs counter to the reasoning of such cases, * * * ."

Among the authorities cited by the Court in support of its ruling were included the case of Bank of Augusta vs. Earle and Hilton vs. Guyot, *supra.* See, also, the following: Gioe vs. Westervelt et al., 116 Fed. 1017; Strauss vs. Conried, 121 Fed. 199; Campagnie Du Port De Rio Janeiro vs. Mead, etc., 19 Fed. (2d) 163.

In Carlesi vs. New York, 233 U. S. 51, the question was as to the effect of a pardon by the President, where the defendant in a State court had been convicted and sentenced as for a second offense, despite the pardon. The question was, whether the State statute imposed an additional punishment for a crime of which defendant had been convicted, and pardoned. The Supreme Court considered itself bound by the construction of the State statute, that it did not, and held that the pardon did not prevent the application of the State statute in the case of a second offense.

The second proviso of Sec. 19 to the effect that the provision respecting deportation should not apply to one who had been pardoned, it has been contended that it having been held that this provision was limited to pardoned offenders committing crimes after entry into the United States, that therefore an intent is shown by the proviso to exclude and deport those convicted prior to entry of offenses involving moral turpitude, whether pardoned or not. It is no doubt true that one of the surest ways of indicating the scope and meaning of a statute [21] is by exception or proviso—that is, by taking out of an enactment what otherwise would have been included. But this rule of construction presupposes the effectiveness of the exception or proviso. If in fact this proviso saved from deportation an alien convict, pardoned by the President, then it might plausibly be argued that an intent was shown to deport a foreign convict, in spite of his pardon.

As above pointed out, it was held in Ex parte Garland that Congress can neither limit the effect of a Presidential pardon, "nor exclude from its exercise any class of offenders." It must therefore be concluded that this proviso was the result of pains taken by Congress to show that there was no intent to interfere in any way with the Presidential pardon prerogative to fully pardon, rather than the assumption of power on the part of Congress to deport a pardoned convict, that is a power asserted by disclaiming a present purpose to exercise it. The taking of such care manifests no in-

tent to deny effect to the pardon of a foreign Executive. The statute is, therefore, to be construed unaffected by this proviso. It subjects to deportation: "any alien who was convicted of or admits the commission, prior to entry, of a felony or other crime or misdemeanor involving moral turpitude."

The reference to the admission of the commission of a crime contemplates an admission where there has been no conviction. The right of pardoning is coextensive with the right of punishment. If, upon a review by an appellate court, petitioner's conviction had been reversed, no one would contend that it was the conviction meant by the statute, although it would fall within the letter of the Act.

A pardon avoids a sentence, sometimes [22] because of mistakes at the trial, and sometimes because of reasons that a Court cannot entertain.

In a decision in 1908, Gesellchaft vs. Umbreit, 208 U. S. 570, the Supreme Court assumed the following from the Prussian treaty of 1828, to be in effect between the United States and Germany:

> " * * * 'There shall be between the territories of the high contracting parties a reciprocal liberty of commerce and navigation. The inhabitants of their respective states shall mutually have liberty to enter the ports, places and rivers of the territories of each party wherever foreign commerce is permitted. They shall be at liberty to sojourn and reside in all parts whatsoever of said territories, in order to attend to their affairs; and they shall enjoy, to that effect, the same security and pro-

tection as natives of the country wherein they reside, on condition of their submitting to the laws and ordinances prevailing.' "

After his pardon, petitioner had the same right, so far as the laws of his country were concerned, as any other of its citizens. The treaty with Prussia was made before the Empire, and the above decision was rendered before the World War and the Republic's succession to the Empire. The Court knows of no writing elsewhere evidencing the right of our nationals to enter and sojourn in Prussia than this treaty, which, as modified by our immigration laws, regulates the right of German citizens of Prussia to enter and sojourn in the United States.

After the war of 1812, in considering the effect that that war had upon the treaty with Great Britain made at the close of the Revolution, it was said by the Supreme Court, in Society of the Propagation of the Gospel vs. New Haven, 8 Wheaton, 464, at 494:

" * * * But we are not inclined to admit the doctrine urged at the bar, that treaties become extinguished, *ipso facto,* by war between the two governments, unless they should be revived by an express or implied renewal on the return of peace.

Whatever may be the latitude of doctrine laid down by elementary writers of the law of nations, dealing in general terms, in relation to [23] this subject, we are satisfied, that the

doctrine contended for is not *is not* universally true. There may be treaties of such a nature, as to their object and import, as that war will put an end to them; but where treaties contemplate a permanent arrangement of territorial, and other national rights, or which, in their terms, are meant to provide for the event of an intervening war, it would be against every principle of just interpretation, to hold them extinguished by the event of war. If such were the law, even the treaty of 1783, so far as it fixed our limits, and acknowledged our indipendence, would be gone, and we would have had again to struggle for both upon original revolutionary principles. Such a construction was never asserted, and would be so monstrous as to supersede all reasoning. We think, therefore, that treaties stipulating for permanent rights, and general arrangements, and professing to aim at perpetuity, and to deal with the case of war as well as of peace, do not cease on the occurrence of war, but are, at most, only suspended while it lasts; and unless they are waived by the parties, or new and repugnant stipulations are made, they revive in their operation at the return of peace. * * * ”

While the treaty of 1828 did not deal with the case of war, and while it did not profess to aim at perpetuity, it did authorize the doing of acts that were bound to result in enduring interests and relations. The petitioner, since residing in the United States, has married and at the time of his

arrest was living with his wife in Seattle. A statute and a treaty should, if possible, be construed so that both can stand together, and be given effect. United States vs. Mrs. Gue Lim, 178 U. S. 459; Chew Heong vs. United States, 112 U. S. 536; Cheung Sum Shee vs. Nagle, 268 U. S. 336. See, also, Powers vs. Comly, 101 U. S. 789, and in the matter of Lum Poi and NG Shee, Case No. 12058 of the causes in this court, a decision rendered January 12th, 1928.

The Court, in Hilton vs. Guyot, *supra,* points out a recognition accorded by Germany to foreign judgments, greater than that in certain other countries. The American Consul at Berlin, who viséed petitioner's passport, was obviously in a better position to know the extent to which the German Government would reciprocate in such a [24] matter, than was the Board of Review, and the province of determining such a question pertains nearer to the office of the Consul than that of the Board.

A reason that may have induced Congress not to define the effect of a foreign pardon is: There are foreign nations whose Governments, laws and civilization are similar to our own, and there are others which are not. There are countries that, though their governments and civilization may be similar to ours, differ in matters of policy as to the recognition of acts by the authorities of other nations, analagous to those here in question. Some of these differences are pointed out above in quotations from the opinion in Hilton vs. Guyot. The principle of reciprocity in such matters is adopted

and approved by the Supreme Court in that case,—such matters are a part of international law which it is the province of the courts to determine.

Sec. 19 of the Immigration Act does not subject to deportation a German citizen of Prussia, convicted of a crime involving moral turpitude, in Prussia, and fully pardoned before entering the United States; as it appears probable that a like comity would be shown by Germany in the case of our nationals found in that country.

As the record now stands, the petitioner should be discharged from custody.

The order will be settled upon notice.

[Endorsed]: Filed Jan. 23, 1926. [25]

[Title of Court and Cause.]

ORDER GRANTING WRIT OF HABEAS CORPUS.

This matter having come on regularly to be heard on the 19th day of December, 1927, on the petition of Erich Paul Hans Hempel for a writ of habeas corpus and the order to show cause issued thereon; the return of Luther Weedin, United States Commissioner of Immigration, District No. 28, thereto, and the demurrer of the petitioner to said return, and the Court having considered said petition, order to show cause, return thereto and the demurrer to said return, and having heard the testimony of the witnesses produced on behalf of the petitioner,

and having considered other proof offered on behalf of said petitioner, and being fully advised in the premises, and the Court having heretofore filed its written opinion herein,—

NOW, THEREFORE, IT IS ORDERED, ADJUDGED and DECREED, that the writ of habeas corpus prayed for in the petitioner's petition be granted, and that the petitioner be discharged from custody, upon filing bond provided for in the attached order this day made.

Done in open court this 24th day of January, 1928.

EDWARD E. CUSHMAN,
Judge.

[Endorsed]: Filed Jan. 24, 1928, 2:10 P. M. [26]

ORDER RELEASING PETITIONER ON BAIL.

The respondent having given notice in open court of an appeal to the Circuit Court of Appeals of the United States for the Ninth Circuit, from the foregoing order, it is further

ORDERED, ADJUDGED AND DECREED that during the pendency of the appeal in the above-entitled matter the petitioner be enlarged on bail in the sum of One Thousand and no/100 Dollars ($1,000.00).

Done in open court this 24th day of January, 1928.

EDWARD E. CUSHMAN,
United States District Judge.

[Endorsed]: Filed Jan. 24, 1928, 2:10 P. M.

[Endorsed]: Filed Jan. 25, 1928, 9:15 A. M. [27]

[Title of Court and Cause.]

ORDER FIXING BOND.

This matter having come on this date to be heard on the oral motion of counsel for the petitioner for reduction of bail as heretofore fixed by this Court in the sum of $1,000.00 pending the appeal of the respondent to the United States Circuit Court of Appeals for the Ninth Circuit, and the Court having considered the affidavit of the petitioner, Erich Paul Hans Hempel, filed in support of said motion, in which the said Erich Paul Hans Hempel tendered one certain United States Liberty Bond, third series, in the sum of $500.00, the same being No. 537,911 in lieu of the bail heretofore fixed by this Court, and the Court being fully advised in the premises,—

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED, that the bail of the petitioner, pending the appeal in the above-entitled action as heretofore fixed by this Court, be and the same is hereby reduced to the sum of $500.00.

AND IT IS FURTHER ORDERED, that the Liberty Bond hereinabove mentioned in the sum of $500.00 be accepted by the Clerk of this court in lieu of cash bond.

Done in open court this 26th day of January, 1928.

EDWARD E. CUSHMAN.

O. K.—ANTHONY SAVAGE,
Asst. U. S. Atty.

Jan. 26, 1928.

[Endorsed]: Filed Jan. 26, 1928. [28]

[Title of Court and Cause.]

NOTICE OF APPEAL.

To Erich Paul Hans Hempel, Appellee, and Patterson & Ross, Attorneys for Said Appellee.

You and each of you will please take notice that Luther Weedin, United States Commissioner of Immigration, District No. 28, respondent in above-entitled cause, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment, decree and order entered in the above-entitled cause on the 24th day of January, 1928, and that the certified transcript of record will be fixed in the said Appellate Court within thirty days from the filing of this notice.

THOS. P. REVELLE,
United States Attorney,
ANTHONY SAVAGE,
Assistant United States Attorney,
Attorneys for Respondent.

Due service and receipt of a copy hereof is admitted this 19 day of March, 1928.

PATTERSON & ROSS,
Attorneys for Appellee.

[Endorsed]: Filed Mar. 19, 1928. [29]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

I.

The Court erred in holding and deciding that a writ of habeas corpus be awarded to the petitioner herein.

II.

The Court erred in holding, deciding and adjudging that the petitioner, Erich Paul Hans Hempel, be discharged from the custody of Luther Weedin, as United States Commissioner of Immigration at Seattle, Washington, District No. 28.

III.

The Court erred in deciding, holding and adjudging that the petitioner, Erich Paul Hans Hempel, was not subject to deportation, but was entitled to remain in the United States.

THOS. P. REVELLE,
THOS. P. REVELLE,
United States Attorney,
ANTHONY SAVAGE.
ANTHONY SAVAGE,
Assistant United States Attorney,
Attorneys for Appellant.

Service admitted this 19th day of March, 1928.

PATTERSON & ROSS,
Attorneys for Petitioner.

[Endorsed]: Filed Mar. 19, 1928. [30]

[Title of Court and Cause.]

STIPULATION RE TESTIMONY TAKEN AT COURT HEARING.

It is hereby stipulated by and between the parties hereto by their respective counsel, that for all purposes of the appeal in the above-entitled matter to the United States Circuit Court of Appeals, for the Ninth Circuit, and for any further appeal of said cause, that the record on appeal may show that at the hearing had before the Honorable Edward E. Cushman, United States District Judge, Western District of Washington, on the 19th day of December, 1927, the proof offered on behalf of the petitioner, Erich Paul Hans Hempel, purported to show that said Erich Paul Hans Hempel had been granted a full pardon under the laws of Germany for the crime of embezzlement, and that prior to his entry into the United States he had by reason of said pardon been restored to all his civil rights under the laws of Germany, and that at the time the said Erich Paul Hans Hempel was so restored to all his civil rights under the laws of Germany, the Governments of the United States of America and of Germany were at peace, and that no evidence to the contrary was offered on behalf of the respondent.

Dated this 10th day of March, 1928.

PATTERSON & ROSS,
Attorneys for Petitioner.
THOS. P. REVELLE,
Attorney for Respondent.
ANTHONY SAVAGE.

[Endorsed]: Filed Apr. 4, 1928. [31]

[Title of Court and Cause.]

STIPULATION FOR TRANSMISSION OF ORIGINAL RECORD.

It is hereby stipulated by and between counsel for petitioner and for the Commissioner of Immigration, that the certified immigration file and records of the Department of Labor covering the deportation proceedings against the petitioner, which were filed with the return of the Commissioner of Immigration to the order to show cause, may be transmitted with the appellate record in this case, and may be considered by the Circuit Court of Appeals in lieu of a certified copy of said immigration files and records of the Department of Labor.

PATTERSON & ROSS,
Attorneys for Petitioner.
THOS. P. REVELLE,
United States Attorney,
ANTHONY SAVAGE,
Assistant United States Attorney,
Attorneys for Appellant.

Received a copy of the within stipulation this 23 day of April, 1928.

_____,

Attorneys for Petitioner.

[Endorsed]: Filed Apr. 25, 1928. [32]

[Title of Court and Cause.]

ORDER FOR TRANSMISSION OF ORIGINAL RECORD.

Upon stipulation of counsel, it is by this Court ORDERED, and the Court does hereby order, that the Clerk of the above-entitled court transmit with the appellate record in said cause the original file and record of the Department of Labor, covering the deportation proceedings against the petitioner, which was filed with the return of the Commissioner of Immigration to the order to show cause, directly to the Clerk of the Circuit Court of Appeals for the Ninth Circuit, in order that the said original immigration file may be considered by the Circuit Court of Appeals in lieu of a certified copy of said record, it being promised by respondent's attorney, Asst. U. S. Atty. Coles, that such records will be returned to the office of the Clerk of this court when the case is concluded.

Done in open court this 23d day of April, 1928.

EDWARD E. CUSHMAN,
United States District Judge.

Received a copy of the within order this 23 day of April, 1928.

PATTERSON & ROSS,
Attorneys for Petitioner.

[Endorsed]: Filed Apr. 24, 1928. [33]

[Title of Court and Cause.]

PRAECIPE FOR APPELLANT FOR TRANSCRIPT OF RECORD ON APPEAL.

To the Clerk of the Above-entitled Court:

You will please prepare and duly authenticate the transcript and following portions of the record in the above-entitled cause for appeal of the said respondent to the United States Circuit Court of Appeals for the Ninth Circuit:

1. Petition for writ of habeas corpus.
2. Order to show cause.
3. Return to order to show cause.
4. Order granting writ of habeas corpus and discharging petitioner, dated January 24, 1928.
5. Order fixing bond of petitioner, dated January 26, 1928.
6. Notice of appeal.
7. Assignment of errors.
8. Stipulation for transmission of original record.
9. Order for transmission of original record.
10. This praecipe.
11. Stipulation respecting testimony taken at court hearing.

12. Memorandum decision.

THOS. P. REVELLE,
United States Attorney,
ANTHONY SAVAGE,
Assistant United States Attorney,
Attorneys for Appellant.

Received a copy of the within praecipe for appellant this 23 day of April, 1928.

PATTERSON & ROSS,
Attorneys for Petitioner.

[Endorsed]: Filed Apr. 24, 1928. [34]

[Title of Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

United States of America,
Western District of Washington,—ss.

I, Ed. M. Lakin, Clerk of the United States District Court for the Western District of Washington, do hereby certify this typewritten transcript of record, consisting of pages numbered from 1 to 34, inclusive, to be a full, true, correct and complete copy of so much of the record, papers and other proceedings in the above and foregoing-entitled cause as is required by praecipe of counsel filed and shown herein, as the same remain of record and on file in the office of the Clerk of said District Court, at Seattle, and that the same constitute the record on appeal herein from the judgment of said United States District Court for the Western District of

Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify the following to be a full, true, and correct statement of all expenses, costs, fees and charges incurred in my office by or on behalf of the appellant for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit:

Clerk's fees (Act of Feb. 11, 1925) for making record certificate or return, 113 folios at 15¢.	$16.95
Certificate of Clerk to Transcript of Record, with seal	.50
Certificate of Clerk to original exhibits, with seal	.50
	$17.95

[35]

I hereby certify that the above cost for preparing and certifying record, amounting to $17.95, will be included as constructive charges against the United States in my quarterly account to the Government of fees and emoluments for the quarter ending June, 30, 1928.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, at Seattle, in said District, this 28th day of April, 1928.

[Seal] ED. M. LAKIN,
Clerk United States District Court, Western District of Washington.

By S. E. Leitch,
Deputy. [36]

[Endorsed]: No. 5480. United States Circuit Court of Appeals for the Ninth Circuit. Luther Weedin, United States Commissioner of Immigration, District No. 28, Appellant, vs. Erich Paul Hans Hempel, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed May 2, 1928.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
For the Ninth Circuit

5480

LUTHER WEEDIN, as United States Commissioner of Immigration at the Port of Seattle, Washington, District No. 28.

Appellant.

vs.

ERICH PAUL HANS HEMPEL

Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE EDWARD E. CUSHMAN, JUDGE

BRIEF OF APPELLANT

ANTHONY SAVAGE
United States Attorney.

PAUL D. COLES
Assistant United States Attorney

Attorneys for Appellant
Office and Postoffice Address:
310 Federal Building, Seattle, Washington.

JOHN F. DUNTON
United States Immigration Service, Seattle
On the Brief

In the

United States Circuit Court of Appeals

For the Ninth Circuit

5480

LUTHER WEEDIN, as United States Commissioner of Immigration at the Port of Seattle, Washington, District No. 28

Appellant

vs.

ERICH PAUL HANS HEMPEL

Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE EDWARD E. CUSHMAN, JUDGE

BRIEF OF APPELLANT

STATEMENT OF CASE.

Erich Paul Hans Hempel, the aspellee, is 28 years of age. He was born in Germany and is a citizen of that country. He was admitted into the United States at the port of New York, November 16, 1923. He was arrested by an

immigrant isnpector under authority of a warrant of arrest issued by the Secretary of Labor, April 15, 1927, charging that he had been found in the United States in violation of the immigration act of February 5. 1917, in that he was a person likely to become a public charge at the time of his entry, and that he had been convicted of or admitted the commission of a felony or other crime or misdemeanor involving moral turpitude, to wit: theft, prior to entry into the United States. He was thereafter accorded a hearing before an immigrant inspector and a deportation warrant was subsequently issued by the Secretary of Labor directing his deportation to Germany, for the same reasons set forth in the charges contained in the warrant of arrest. Thereafter a petition for a writ of habeas corpus was filed in the United States District Court for the Western District of Washington, Northern Division. After a hearing on an order to show cause why a writ of habeas corpus should not issue, such writ was granted by the Honorable Edward E. Cushman, District Judge, and subsequently an order releasing the petitioner, Erich Paul Hans Hempel, was also entered.

The Commissioner of Immigration duly filed his notice of appeal and proceedings to perfect said appeal were duly instituted. The following assignments of error were urged:

"I.The Court erred in holding, and deciding that a Writ of Habeas Corpus be awarded to the petitioner herein."

"II. The Court erred in holding, deciding and adjudging that the petitioner, Eric Paul Hans Hempel, be discharged from the custody of Luther Weedin, as United States Commissioner of Immigration at Seattle, Washington, Discrict No. 28."

"III. The Court erred in deciding, holding and adjudging that the petitioner, Erich Paul Hans Hemsel, was not subject to deportation, but was entitled to remain in the United States."

ARGUMENT.

Section 3 of the Immigration Act of February 5, 1917 (39 Stat. L. Ch. 29, p 874) reads as follows:

> "That the following classes of aliens shall be excluded from admission into the United States: *
> Person who have been convicted of or admit having committed a felony or other crime or misdemeanor involving moral turpitude; * * *
> persons likely to become a public charge;" * * "

The appellee had been convicted in Germany of theft and had served 18 months in prison therefor, prior to coming to this country. He also admitted in his testimony that he had to carry money to the bank, and that

he kept that money for himself, and that he used some of said money. No contention was raised that the crime which he admitted having committed, and of which he was convicted, was not a crime involving moral turpitude. Consequently he belonged to a class of aliens mandatorily excluded by the above Section of the statute, had his guilt or conviction been made known to the immigration authorities at the time he applied for admission.

The fact that appellee had been convicted of theft in Germany, and the further fact that he had had two children by a woman to whom he was not married, and whom he had abandoned when he came to this country, justify the conclusion of the Secretary of Labor that he was a person likely to become a public charge at the time of his entry.

It has been held by various courts that aliens "likely to become a public charge" include not only those lacking means of support, but also those who are likely to be boarded at public expense for violation of our laws.

U. S. ex. rel Freeman vs. Williams, 175 Fed. 274 (D. C. N. Y.)
Lum Fung Yen ve. Frick, 233 Fed 393, Certorari denied, 242 U. S. 642, 61 L. Ed. 542.
Ex parte Riley, 17 Fed. (2d) 646 (D. C. Maine)

In the case of *Ex parte Hosaya Sakaguchi* 277 Fed. 913, this Court said:

> "If there were in this case any evidence whatever of mental or physical disability, *or any fact tending to show that the burden of supporting the appellant is likely to be cast upon the public, we should have no hesitation in saying that the conclusion of the board of special inquiry would be unassailable in a court.*" (Itales ours.)

See also: *Ex parte Tsunataro Machida*, 277 Fed. 239 (*D. C. Wash.*)
Ex parte Fragoso' 11 Fed. (2d)) 988, (D. C. Cal.)
Guimoud vs. Howes, 9 Fed. (2d) 412 (D. C. Maine)

Section 19 of the Imimgration Act of Februry 5th, 1917 provides that at any time within five years after entry, any alien who at the time of entry was a member of one or more of the classes excluded by law, shall, upon the warrant of the Secretary of Labor, be taken into custody and deported (See first clause of said section.) The second clause also directs the deportation in like manner of "any alien who shall have entered or who shall be found in the United States in violation of this Act, or in violation of any other law of the United States."

The fifth clause of the same section reads as follows:

> "*Except as hereinafter provided*, any alien who is *hereafter* sentenced to imprisonment for a term of one year or more because of conviction *in this country of a crime involving moral terpitude committed within five years after the entry of the alien to the United States*, or who is hereafter sentenced more than once to such a term of imprisonment because of conviction *in this country* of any crime inuolving moral terpitude, committed at any time after entry:" (Italics ours.)

The tenth clause of the same section reads as follows:

> "Any alien who was convicted, or who admits the commission, prior to entry, of a felony or other crime or misdemeanor involving moral terpitude."

The section directs that both above classes of aliens shall, upon the warrant of the Secretary of Labor, be taken into custody and deported.

The fifth clause relates solely to conviction of a *crime involving moral terpitude, committed after entry.*, and begins: "*Except as hereinafter provided.*" The tenth clause relates solely to conviction (or adm ssion of the commission,) *prior to entry, of a felony, or other crime or misdemeanor involving moral terpitude, and contains no proviso.* This appellee is clearly included in the latter class of aleins.

The second proviso in the same section reads as follows:

"Provided further, that the provision of this section respecting the deportation of aliens convicted of a *crime involving moral terpitude* shall not apply to one who has been pardoned, nor shall such deporta tion be made or directed if the court, or judge thereof, sentencing such alien for such crime shall, at the time of imposing judgment or passing sentence, or within thirty days thereafter, due notice having first been given to representatives of the State, make a recommondation to the Secretary of of Labor that such alien shall not be deported in pursuance of this act; nor shall any alien convicted as aforesaid be deported until after the termination of his imprisonment." (Italics ours.)

It will be noted that this proviso does not read ,'*provisions*," and does not read "convicted, or who admits the commission, prior to entry, of a felony or other crime or misdemeanor involving moral terpitude," but is couched in the identical language of the 5th clause of the section: "*convicted of a crime involving moral terpitude.*"

Congress must have had in mind both classes of aliens and the provisions for their deportation under Section 19, at the time the statutes was passed. If it had intended that the second proviso, supra, should apply to both provisions for deportation (contained in the 5th & 10th. clauses,) there is no reason why the statute should

read "*provision*," instead of "*provisions*," and should also read "*crime iuvolving moral terpitude*," instead of "felony or other crime or misdmeanor involving moral turpitude." The entire contex of the proviso shows plainly that it relates solely to aliens convicted of crime *committed after entry into the the United States*, and has no application to the tenth clause of the section. This was the view taken by the Circuit Court of Appeals for the Second Circuit in the case of *United States ex rel. Palermo vs. Smith*, 17 Fed. (2d) 534.

In his decision granting a Writ of Habeas Corpus to the present appellee (23 Fed. (2d) 949-956), District Judge Cushman entirely ignored the PUBLIC CHARGE feature of the case, and held, in effect, that the provisions of Section 19 of the Immigration Act of February 5, 1917, under which appellee was ordered deported, should be construed along with a stipulation which he quoted from the treaty between the United States and Prussia of 1828 (8 Stat. 378), which he held to be still in effect:

"* * * There shall be between the territories of the high contracting parties, a reciprocal liberty of commerce and navigation. The inhabitants of their respective states shall, mutually, have liberty to enter the ports, places, and rivers of the territories of each

party, wherever foreign commerce is permitted. They shall be at liberty to sojourn and reside in all parts whatsoever of said territories, in order to attend to their affairs, and they shall enjoy, to that effect, the same security and protection as natives of the country wherein they reside, on condition of their submitting to the laws and ordinances there prevailing."

We are advised, however, that the State Department informed the Department of Labor that said treaty was terminated by the war between the United States and Germany for the reason that Article 289 of the Treaty of Versailles declared that all treaties between Germany and a Power which was at war with Germany were to be considered abrogated unless such Power gave notice to Germany to the contrary within six months after the ratification of the Treaty of Versailles, and that no such notice was ever given by the United States to Germany. The language of the Article shows that the view of the State Department is correct, at least in so far as treaties between Germany and the Allied and Associated Powers signatory to the treaty are concerned. The treaty of peace of August 25, 1921, (42 Stat. 1939), between the United States and Germany, stipulates that Germany accords to the United States all the rights, privileges and advantages

stipulated for the benefit of the United States in the Treaty of Versailles, notwithstanding the fact that such treaty was not ratified by the United States.

Section 5 of the Act of March 3, 1875 (18 Stat. 476-477) provided for the exclusion of "persons who are undergoing a sentence for a conviction in their own country of felonious crimes other than political or growing out of or the result of such political offenses, or whose sentence has been remitted on condition of their emigration."

Section 4 of the Act of August 3, 1882 (22 Stat. 214) provide for the exclusion and return to their own countries of "all foreign convicts except those convicted of political offenses."

The Act of March 3, 1891 (26 Stat. 1084) provided (Section 1) for the exclusion of "persons who have been convicted of a felony or other infamous crime or misdemeanor involving moral turpitude," with the proviso "that nothing in this act shall be construed to apply to or exclude persons convicted of a political offense, notwithstanding said political offense may be designated as a 'felony, crime, infamous crime or misdemeanor involving moral turpitude' by the laws of the land whence he came or by the court convicting."

Section 11 of the same Act provided for the deportation of aliens who come to the United States in violation of law.

The Act of March 3, 1903 (32 Stat. 1213) provided (Section 2) for the exclusion of "all persons who have been convicted of a felony or other crime or misdemeanor involving moral turpitude," with the proviso "that nothing in this Act shall exclude persons convicted of an offense purely political, not involving moral turpitude." Section 20 of the same Act provided for the deportation of aliens who come to the United States in violation of law.

Section 2 of the Act of February 20, 1907 (34 Stat. 898) provided for the exclusion of "persons who have been convicted of or admit having committed a felony or other crime or misdemeanor involving moral turpitude," with the proviso "that nothing in this act shall exclude, if otherwise admissible, persons convicted of an offense purely political, not involving moral turpitude." Section 21 of the same act provided for the deportation of aliens "found in the United States in violation of this Act * * *."

Section 3 of the Immigration Act of February 5, 1917, *supra*, contains the proviso "That nothing in this

act shall exclude, if otherwise admissible, persons convicted, or who admit the commission, or who teach or advocate the commission, of an offense purely political."

Thus Congress, in the whole line of Acts which it has passed on the matter of exclusion and deportation of aliens because of conviction of crime prior to entry, has been limiting the provisions and making exceptions, but in no case has it made an exception in cases of pardon except in Section 19 of the Act of February 5, 1917, as hereinbefore quoted. It said nothing regarding pardons in Section 3 of that Act, where the Act is dealing only with crimes committed abroad prior to entry.

The provision in the Act of 1917 as to crimes committed abroad covers not only those where there has been a conviction, *but also those where there is simply an admission.* If it be held that a pardon by a foreign government relieves the alien from deportation, the result would be that aliens who have been convicted and pardoned abroad would not be subject to deportation, but an alien who had committed a crime abroad, which had never become known, (in which case he would not have been convicted and pardoned) who in this country

admitted the commission of such crime, would be subject to deportation. It is not believed that Congress contemplated such an absurdity. The intention of Congress to render all aliens who had committed crimes abroad involving moral turpitude subject to exclusion and deportation, whether convicted or not, is amply evidenced by the insertion in the Acts of 1907 and 1917 of the provision regarding the admission of the commission of such crimes, and there is nothing in any of the various acts to indicate any intention to exempt from deportation aliens pardoned abroad for crimes committed abroad. The intention of Congress must control, as its right to deport aliens is as absolute and unqualified as its right to prohibit their entry *(Fong Yue Ting v. United States*, 149 U. S. 698, 707), and it has power to exclude aliens for any reason it may deem sufficient *(Chea Chan Ping v. United States*, 130 U. S. 581). An act of Congress would prevail over a prior treaty in direct conflict *(Ex Parte Wong Gar Wah*, 18 Fed. (2d) 250; *Jeu Jo Wan v. Nagle*, 9 Fed. (2d) 309).

The fact that appellee's passport was visaed by an American Consul in Germany did not give appellee any right to admission into the United States. That was a matter solely for the immigration officials. The

appellee says that the American Consul was apprised of his criminal record. Whether or not such was the case does not matter. The immigration officials at New York evidently were not apprised of such record, or the appellee would not have been admitted.

The letter of Commissioner Weedin from which the District Judge quotes (pp. 16-17 of the transcript) is error, as there was no such document as an "Immigration Visa" prior to the Immigration Act of 1924 (43 Stat. L. Ch. 190, p. 153).

The statements of the District Judge, and the various citations in his opinion, with respect to the effect of a pardon by the President, or other pardoning officials in this country, do not appear to have any direct bearing on the present case.

We maintain that the appellee is subject to deportation on both charges contained in the deportation warrant, and that the District Court was in error in granting the Writ of Habeas Corpus and ordering him released from the custody of the Commissioner of Immigration.

Respectfully submitted,

ANTHONY SAVAGE
United States Attorney.

PAUL D. COLES
Assistant United States Attorney

Attorneys for Appellant
Office and Postoffice Address:
310 Federal Building, Seattle, Washington.

JOHN F. DUNTON
United States Immigration Service, Seattle
On the Brief

United States

Circuit Court of Appeals

For the Ninth Circuit.

JOSEPH BROWNLEE and
BARBARA BROWNLEE,

Appellants,

vs.

MUTUAL BENEFIT HEALTH AND
ACCIDENT ASSOCIATION,

Appellee.

Transcript of Record

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON.

WILLAMETTE PRINTING CO.

United States

Circuit Court of Appeals

For the Ninth Circuit.

JOSEPH BROWNLEE and
BARBARA BROWNLEE,

Appellants,

vs.

MUTUAL BENEFIT HEALTH AND
ACCIDENT ASSOCIATION,

Appellee.

Transcript of Record

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON.

WILLAMETTE PRINTING CO.

INDEX

TESTIMONY:

NAMES AND ADRESSES OF ATTORNEYS OF RECORD

ERNEST COLE, Chamber of Commerce Building, Portland, Oregon,
For the Appellant.

MCCAMANT and THOMPSON, American Bank Building, Portland, Oregon,
For Appellee.

In the District Court of the United States for the District of Oregon.

No. L.—10264.

JOSEPH BROWNLEE and
BARBARA BROWNLEE,
Plaintiffs,

vs.

MUTUAL BENEFIT HEALTH AND ACCIDENT ASSOCIATION,
Defendant.

CITATION ON APPEAL

To Mutual Benefit Health and Accident Association, and to McCamant and Thompson, your attorneys of record and to each of you:

GREETING:

YOU ARE HEREBY CITED AND ADMONISHED to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, within thirty days from the date hereof, pursuant to a notice of appeal filed in the

Clerk's Office of the District Court of the United States for the District of Oregon, wherein Joseph Brownlee and Barbara Brownlee are the appellants and you are appellee, to show cause, if any there be, why the judgment in the said cause should not be corrected and speedy justice should not be done to the parties in that behalf.

GIVEN under my hand, at Portland, in said District, this 6th day of April, in the year of our Lord one thousand nine hundred and twenty-eight.

JOHN H. McNARY,
Judge.

Due service accepted hereon this 6th day of April, 1928.

WALLACE McCAMANT
of attorneys for defendant

Filed April 6th, 1928. G. H. Marsh, Clerk.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON.

MARCH TERM, 1928.

BE IT REMEMBERED That on the 8th day of December, 1927, there was duly filed in the UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON, a transcript of record and the complaint contained therein, is in words and figures as follows, to-wit;

In the Circuit Court of the State of Oregon for the County of Multnomah

JOSEPH BROWNLEE and
BARBARA BROWNLEE,

Plaintiffs,

vs.

MUTUAL BENEFIT HEALTH AND
ACCIDENT ASSOCIATION,
a Corporation,

Defendant.

COMPLAINT

Plaintiffs for cause of action against the defendant, does allege as follows:

I.

That the defendant is, and was at all times hereinafter mentioned, a Mutual Benefit Health and Accident Association duly incorporated under and by virtue of the laws of the State of Nebraska, and doing a general business of insuring its members and policy holders against accidental injury, death and sickness.

II.

That on or about the 16th day of November, 1925, in consideration of the payment by one, Leslie J. Brownlee to the defendant a premium in the sum of $46.00, the defendant made, executed and delivered unto the said Leslie J. Brownlee, the insured named therein, its policy of health and accident insurance in writing for the sum of $5000.00 payable in case of accidental death to these plaintiffs as beneficiaries named therein, a copy of which policy is hereto attached and made a part hereof, and marked "EXHIBIT A."

III.

That said policy, for and in consideration of the said sum of $46.00 so paid by the said insured, Leslie

J. Brownlee, provided among other things, that same would be kept and remain in full force and continuous effect until 12 o'clock noon of April 1st, 1926, and that upon the further payment of quarterly premiums in the sum of $9.00, that said policy would be kept and remain in continuous effect and full force so long as said quarterly premiums were paid in advance as they became due.

IV.

That on the first day of January, 1927, and prior to 12 o'clock noon of said date and while said policy was in full force and effect, and while the said insured, Leslie J. Brownlee, was on an outing and pleasure trip on Mount Hood, situated in the County of Hood River, State of Oregon, the said Leslie J. Brownlee received and sustained bodily injuries effected through external, violent and accidental means, which said means alone caused his death prior to January 20, 1927, and within thirteen weeks from the said date of January first, 1927, and that the said injuries were so received and sustained in and about the body by stepping, falling and sliding from, off and along the mountain sides of said mountain into pits, holes and crevasses situated on and in said mountain while traversing same, and from the exposure to the inclemency and freezing conditions of the weather which existed on said mountain at said time and date, and that a more particular description of said injuries and how received on and at said time and date of January first, 1927, or the exact time thereafter of his said death from the effects thereof, which took place prior to January 20, 1927, and within thirteen weeks from the said date of said injuries, these plaintiffs are unable to give at this time.

V.

That the said insured, Leslie J. Brownlee, deecased, duly performed all the conditions of said policy on his part to be performed, and had paid all the quarterly premiums due thereon up to and including the said date of January first, 1927, at 12 o'clock noon.

VI.

That the plaintiffs are the identical Joseph Brownlee and Barbara Brownlee named as beneficiaries in said policy, and that the said insured, Leslie J. Brownlee, did not at any time substitute any other beneficiary in place of plaintiffs in said policy, and that the plaintiffs herein are now inhabitants of Multnomah County, State of Oregon.

VII.

That the plaintiffs have duly performed all the conditions of said policy on their part to be performed, and immediately thereafter said date of January first, 1927, and as soon as the said facts heretofore alleged were known to these plaintiffs, and on or about the 20th day of January, 1927, notified the said defendant of said injuries, and accidental death therefrom and the circumstances surrounding same, and offered to submit proofs thereof and demanded payment of the said policy, but that the said defendant did then and there failed and refused to furnish the necessary blanks for said report or proof or accept the said offer of proof, or to pay the said policy or any part thereof and denied all liability thereon, for the reason and upon the grounds that the said defendant was not liable on said policy and that same would not be paid, and that the said defendant has continued ever since said time and does now deny all liability on or by virtue of said policy by reason of said injuries and death,

and that more than 60 days have elapsed since said notice and offer of proof was made to the defendant by these plaintiffs.

VIII.

That no part of the said sum of $5000.00 provided by said policy in case of accidental death has been paid, although due demand has been made for same, and was so made on or about the 20th day of January, 1927, and that same became due and payable within 60 days from said date of January 20th, 1927, and that there is now owing and due from the defendant to these plaintiffs the sum of $5000.00 together with interest thereon at the rate of six per cent per annum from the 21st day of March, 1927, until paid.

IX.

That the sum of $1000.00 is a reasonable amount to be allowed as and for attorney fees and charges of counsel herein, under and by virtue of Section 6355 Oregon Laws as amended by chapter 184 Oregon session laws for the year 1927, as in such cases, made and provided therein.

WHEREFORE plaintiffs pray for a judgment against the defendant for the sum of $5000.00 together with interest thereon at the rate of six per cent per annum from the 21st day of March, 1927, until paid, and for the further sum of $1000.00 as and for a reasonable attorney fee herein, and for their costs and disbursements incurred herein.

ERNEST COLE,
Attorney for Plaintiffs.

EXHIBIT "A"

NON-PRORATING BUSINESS MEN'S SPECIAL POLICY.

THIS POLICY PROVIDES BENEFITS FOR LOSS OF LIFE, LIMB, SIGHT, OR TIME BY ACCIDENTAL MEANS, OR LOSS OF TIME BY SICKNESS AS HEREIN PROVIDED.

MUTUAL BENEFIT HEALTH and ACCIDENT ASSOCIATION

OMAHA

(herein called Association)
Does hereby insure.
No. 36-39130

Monthly	Premium $46.00
Benefits $100.00	Death benefit $5000.00
Maximum	Maximum
Monthly Benefits $200.00	Death benefit $10,000.00

(Insuring clause) Leslie J. Brownlee (herein called the insured), of the city of Portland, State of Oregon, against loss of life, limb, sight or time, resulting directly and independently of all other causes, from bodily injuries sustained through purely Accidental Means (Suicide, sane or insane, is not covered), and against loss of time on account of disease contracted during the term of this policy, respectively, subject, however, to all the provisions and limitations hereinafter contained.

ACCIDENT INDEMNITIES
SPECIFIC LOSSES

PART A.

If the insured shall, through accidental means, sustain bodily injuries as described in the Insuring clause, which shall independently and exclusively of disease and all other causes, immediately, continuously and wholly disable the Insured from the date of the accident and result in any of the following specific losses within thirteen weeks, the Association will pay

For loss of life.....$5000.00
And in addition $100. a month for the period between the date of accident and the date of death.

For loss of both eyes.....$5000.00
For loss of both hands.....$5000.00
For loss of both feet.....$5000.00
For loss of one hand and one foot.....$5000.00
For loss of either hand.....$1500.00
For loss of either foot.....$1500.00
For loss of either eye.....$1500.00

Loss in every case referred to in the above schedule for dismemberment of hands and feet shall mean severance at or above the wrist or above the ankle joint, respectively, and the loss of eye or eyes shall mean the total and irrevocable loss of entire sight thereof. Only one of the amounts named in this part will be paid for injuries resulting from one accident, and shall be in lieu of all indemnity.

DOUBLE SPECIFIC LOSSES

PART B.

If the insured sustains injuries as described in the insuring Clause, while riding as a passenger, within the enclosed part of any railway or street railway passenger car, provided by a common carrier for passenger service only, propelled by steam or electricity, caused by the wrecking of the conveyance, and such injuries independently and exclusively of disease and all other causes shall cotninuously and wholly disable the Insured from the date of the accident and result in any of the following specific losses within thirteen weeks from the date of the acident, the Association will pay;

For loss of life.....$10,000.00
And in addition, $200.00 a month for the period between the date of accident and the date of death.
For loss of both eyes.....$10,000.00
For loss of both hands.....$10,000.00
For loss of both feet.....$10,000.00
For loss of one hand and one foot.....$10,000.00
For loss of either hand.....$ 3,000.00
For Loss of either foot.....$ 3,000.00

For loss of either eye.....$ 3,000.00

Loss in every case referred to in the above schedule for dismemberment of hands and feet shall mean at or above the wrist or above the ankle joint, respectively, and the loss of eye or eyes shall mean the total and irrevocable loss of entire sight thereof. Only one of the amounts named in this part will be paid for injuries resulting from one accident, and shall be in lieu of all other indemnity.

(Seal.)

TOTAL ACCIDENT DISABILITY ONE HUNDRED DOLLARS PER MONTH FOR LIFE.

PART C.

If such injuries as described in the insuring Clause, shall wholly and continuously disable the Insured for one day or more, and so long as the Insured lives and suffers said total loss of time, the Association will pay a monthly indemnity at the rate of One Hundred ($100.00) Dollars.

PART D.

PARTIAL ACCIDENT DISABILITY FORTY DOLLARS PER MONTH

If such injuries, as described in the insuring Clause, shall wholly and continuously disable the Insured from performing one or more important duties, the Association will pay for the period of such partial loss of time but not exceeding three consecutive months, a monthly indemnity of Forty ($40.00) Dollars.

DOUBLE INDEMNITY TWO HUNDRED DOLLARS PER MONTH FOR LIFE.

PART E.

If the insured sustains injuries while riding as a passenger, within the enclosed part of any railway or street railway passenger car, provided by a common carrier for passenger service only, propelled by steam or electricity, caused by the wrecking of the convey-

ance, the Association will pay double the amount of monthly indemnity the Insured would otherwise receive.

FULL INDEMNITY FOR SEPTIC INFECTION

PART F.

If accidental bodily injuries covered by this policy result in septic infection or blood poisoning, the disability or loss consequent thereon shall be deemed due to accident, and indemnities therefor in full as provided by this policy will be paid for loss of life, limb, sight or time.

MEDICAL ATTENDANCE TWENTY-FIVE DOLLARS

PART C.

If such injuries require immediate medical or surgical treatment by a physician, surgeon or osteopath, and insured makes no other claim on account of such injuries, the Association will reimburse the insured for the cost thereof, not exceeding Twenty-Five ($25.00) Dollars.

FINANCIAL AID TWO HUNDRED DOLLARS

PART H.

If such injuries render the Insured physically unable to communicate with friends, the Association will upon receipt of a message giving this policy number, immediately transmit to the relatives or friends of the insured any information respecting him, and will defray all expenses necessary to put the insured in comcunication with, and in the care of friends, provided such expense shall not exceed the sum of Two Hundred ($200.00) Dollars. This benefit to be in addition to any other benefits.

ILLNESS INDEMNITIES CONFINING ILLNESS ONE HUNDRED DOLLARS PER MONTH FOR LIFE

PART I.

The Association will pay, for one day or more at the rate of One Hundred ($100.00) Dollars per month for disabiilty resulting from disease, the caues of which originates more than thirty days after the date of this policy, and which confines the Insured continuously within doors and requires regular visits therein by legally qualified physician; provided said disease necessitates total disability and total loss of time.

NON-CONFINING ILLNESS FIFTY DOLLARS PER MONTH

PART J.

The Association will pay, for one day or more, at the rate of Fifty ($50.00) Dollars per month, but not exceeding one month, for disability resulting from disease, the cause of which originates more than thirty days after the date of this policy, and which does not confine the Insured continuously within doors but requires regular medical attention; provided said disease necessitates total disability and total loss of time.

ONE HUNDRED SEVENTY-FIVE DOLLARS PER MONTH WHILE IN HOSPITAL

PART K.

If the insured on account of any accidental injury or disease covered by this policy shall enter a hospital and be necessarily and continuously confined therein solely on account of said injury or disease, the Association will reimburse him for his actual hospital expense, but not exceeding Seventy-five ($75.00) Dollars per month or a proportionate amount for any fractional part of a month. This benefit is in addition to any other monthly benefits and shall be payable for a period not exceeding three months.

STANDARD PROVISIONS

1. This policy includes the endorsements and attached papers, if any, and contains the entire contract of insurance. No reduction shall be made in any indemnity herein provided by reason of change in the occupation of the insured or by reason of his doing any act or thing pertaining to any other occupation.

2. No statement made by the applicant for insurance not included herein shall void the policy or be used in any legal proceeding hereunder. No agent has authority to change this policy or to waive any of its provisions. No change in this policy shall be valid, unless approved by an executive officer of the Association and such approval be endorsed hereon.

3. If default be made in the payment of the agreed premium for this policy, the subsequent acceptance of the premium by the Association or any of its duly authorized agents shall reinstate the policy, but only to cover accidental injury thereafter sustained and such sickness as may begin more than ten days after the date of such acceptance.

4. Written notice of injury or of sickness on which claim may be based must be given to the Association within twenty days after the date of the accident causing such injury or within ten days after the commencement of disability from such sickness. In the event of accidental death immediate notice thereof must be given to the Association.

5. Such notice given by or in behalf of the insured or beneficiary, as the case may be, to the Association at Omaha, Nebraska, or to any authorized agent of the Association, with patriculars sufficient to identify the Insured, shall be deemed to be notice to the Association. Failure to give notice within the time provided in this policy shall not invalidate any claim if it shall be shown not to have been reasonably possible to give such notice and that notice was given as soon as was reasonably possible.

6. The Association upon receipt of such notice, will furnish to the claimant such forms as are usually furnished by it for filing proofs of loss. If such forms are not so furnished within fifteen days after the receipt of such notice, the claimant shall be deemed to have complied with the requirements of this policy as to proof of loss upon submitting within the time fixed in the policy for filing proofs of loss, written proof covering the occurence, character and extent of the loss for which claim is made.

7. Affirmative proof of loss must be furnished to the Association at its said office in case of claim for loss of time from disability within ninety days after the termination of the period for which the Association is liable, and in case of claim for any other loss within ninety days after the date of such loss.

8. The Association shall have the right and opportunity to examine the person of the insured when and so often as it may reasonably require during the pendency of claim hereunder, and also the right and opportunity to make an autopsy in case of death where it is not forbidden by law.

9. All indemnities provided in this policy for loss other than that of time on account of disability will be paid within sixty days after receipt of due proof.

10. Upon request of the insured and subject to due proof of loss all of the accrued indemnity for loss of time on account of disability will be paid at the expiration of each month during the continuance of the period for which the Association is liable and any balance remaining unpaid at the termination of such period will be paid immediately upon receipt of due proof.

11. Indemnity for loss of life of the insured is payable to the beneficiary if surviving the insured, and otherwise to the estate of the insured. All other indemnities of this policy are payable to the insured.

12. If the insured shall at any time change his occupation to one classified by the Association as less hazardous than that stated in the policy the Association upon written request of the insured and surrender of the policy, will cancel the same and will return to the insured the unearned premium.

13. Consent of the beneficiary shall not be requisite to surrender or assignment of this Policy, or to change of beneficiary or to any other changes in the policy.

14. No action at law or in equity shall be brought to recover on this policy prior to the expiration of sixty days after proof of loss has been filed in accordance with the requirements of this policy, nor such action be brought at all unless brought within two years from the expiration of the time within which proof of loss is required by the policy.

15. If any time limitation of this policy with respect to giving notice of claim or furnishing proof of loss is less than that permitted by the law of the state in which the insured resides at the time this policy is issued, such limitation is hereby extended to agree with the minimum period permitted by such law.

ADDITIONAL PROVISIONS

(a) This policy does not cover death disability, or other loss sustained in any part of the world except the United States and Canada, or while engaged in military or naval service, or while the insured is not continuously under the professional care and regular attendance, at least once a week, beginning with the first treatment, of a licensed physician or surgeon, other than himself; or received because of or while participating in aeronautics; or resulting from insanity; or disability from any disease of organs which are not common to both sexes.

(b) Strict compliance on the part of the insured and beneficiary with all the provisions and agreements of this policy, and the application signed by the insured, is a condition precedent to recovery, and any

failure in this respect shall forfeit to the Association all right to any indemnity.

(c) The copy of the application indorsed hereon is hereby made a part of this contract and this policy is issued in consideration of the statements made by the insured in the application and the payment in advance of Forty-Six ($46.00) Dollars the first year; and the payment in advance of premiums of Thirty-Six ($36.00) Dollars annually or Nine ($9.00) Dollars Quarterly thereafter, beginning with April 1st, 1926, is required to keep this policy in continuous effect. If any such dues be unpaid at the office of the Association in Omaha, Nebraska, this policy shall terminate on the day such payment is due. The mailing of notice to the insured at least fifteen days prior to the date they are due shall constitute legal notice of dues.

The acceptance of any premium on this policy shall be optional with the Association, and should the premium provided for herein be insufficient to meet the requirements of this policy, the Association may call for the difference as required.

(d) The term of this policy begins at 12 o'clock noon Standard Time, on date of issue against accident and on the thirty-first day after date of issue against disease and ends at 12 o'clock noon on date any renewal is due.

(e) No provision of the charter or by-laws of the Association not included herein shall avoid the policy or be used in any legal proceeding hereunder.

(f) The annual meeting of the Association will be held at ten o'clock A. M. on the Second Saturday after the first day of February, at the home office of the Association.

IN WITNESS WHEREOF, MUTUAL BENEFIT HEALTH & ACCIDENT ASSOCIATION has caused this policy to be signed by its President and its Treasurer, and dated this 16th day of November,

1925, but the same shall not be binding upon the Association until countersigned by its duly authorized Policy Clerk.

C. C. CRISS,
Treasurer.

H. S. WELLER,
President.

Countersigned by
O. N. GRIM,
Policy Clerk.

COPY OF APPLICATION

1. What is your full name? Leslie J. Brownlee.

2. What is your age? 19. Date of birth? June 13. Place of birth? London, England (State)..... Height? 5 feet 7 inches. Weight? 135 pounds.

3. What is your residence address? 111 West Mohawk Street, town of Portland, State of Ore.

4. Whom do you name as beneficiary? NAME, Joseph Brownlee; Barbara Brownlee. Address? Same. What is the relationship of the beneficiary to you? Father and Mother.

5. Are you member of firm or employee? Employee. Name of firm? Bertha Stuart. Nature of business? Interior decorating. Location of firm? 152 12th Street, Town of Portland, State of Oregon.

6. What is your occupation? Office duties and selling.

7. What are all of your duties connected therewith? General duties.

8. What accident or health insurance do you carry? Give names of all companies or associations and amounts; None. Have you any application for life, accident or health insurance pending? Answer as to each, No.

9. Has any application ever made by you for life, accident or health insurance been declined? Answer as to each, No. Has any life, health or accident policy issued to you been cancelled? Answer as to each, No. Has any renewal of a life, accident or health policy been refused by any company or association? Answer as to each, No. If so give full particulars, No.

10. Have you ever made claim for or received indemnity on account of any injury or illness? If so, give companies or associations, dates, amounts and causes, No.

11. Are you sound physically and mentally? Answer as to each, Yes. Are you maimed or deformed? Answer as to each, No. Have you any impairment of sight or hearing? Answer as to each, No. Have you ever had a hernia? No. Are your habits correct and temperate? Yes.

12. Have you ever had any of the following diseases; Rheumatism? No. Tuberculosis? No. Epilepsy? No. Diabetes? No. Heart Disease? No. Any disease of the brain or nervous system? No.

13. Have you received medical or surgical advise or treatment or had any local constitutional disease within the past five years? Answer as to each, No.
In (Year) for..... lasting.....
In..... for..... lasting.....
(Nature of Disease) (State Duration)

14. Have you ever been operated on by a physician or surgeon? Yes, date 1916, for appendicitis; result, recovered.

15. Do your average weekly earnings equal or exceed the weekly indemnity payable under the policy now applied for and under all other accident and health policies now carried by you? Yes.

16. What is the form number of policy applied for? 36. What is the premium $9.00 quarterly, noncancelable.

17. Do you agree that this application shall not be binding upon the Association until accepted by the Association, nor until the policy is accepted by the insured while in good health? Yes.

18. Do you hereby apply to the MUTUAL BENEFIT HEALTH & ACCIDENT ASSOCIATION for a policy to be based upon the foregoing statements of facts, and do you understand and agree that the falsity of any statement in this application shall bar the right to recover if such false statement is made with intent to deceive or materially affects either the acceptance of the risk or the hazard assumed by the Association, and do you agree to notify the Association promptly of any change in your occupation, or if you take additional insurance? Yes.

Attached to said policy is the following:

To be attached to and form a part of policy number 36-39130.

NON-CANCELLABLE ENDORSEMENT

The Association cannot cancel this policy during any period for which the premium has been paid, anything in the standard Provisions to the contrary notwithstanding.

IN WITNESS WHEREOF, MUTUAL BENEFIT HEALTH & ACCIDENT ASSOCIATION has caused this endorsement to be signed by its President and its Treasurer, and the same shall be binding upon the Association when countersigned by its duly authorized Policy Clerk.

C. C. CRISS, Treasurer. H. S. WELLER, President.

Countersigned,
O. N. GRIM.

Dated at Portland, this 12th day of Nov. 1925.
Signature of Applicant Leslie J. Brownlee.

State of Oregon,
County of Multnomah,—ss.

I, JOSEPH BROWNLEE, being first duly sworn depose and say that I am one of the within named plaintiffs in the above named entitled cause and that the foregoing complaint is true as I verily believe.

JOSEPH BROWNLEE.

Subscribed and sworn to before me this 3rd day of November, 1927.

ERNEST COLE,
Notary Public for Oregon.

My commission expires November 1st, 1931.
Filed December 8th, 1927—G. H. MARSH, Clerk.

AND AFTERWARDS: to-wit, on the 5th day of January, 1928, the defendant filed its answer to plaintiff's complaint, which is in words and figures, as follows, to-wit:

ANSWER

(Title of Court and Cause)

COMES NOW the defendant and for its answer to the complaint:

I.

Admits the allegations of Paragraph I.

II.

Admits the allegations of Paragraph II except that the defendant denies that on the 16th day of November, 1925, Leslie J. Brownlee paid to the defendant Forty-six Dollars ($46.00) or any sum in excess of Nineteen Dollars ($19.00).

III.

Denies each and every allegation contained in Paragraph III except that the defendant admits that it executed and delivered to Leslie J. Brownlee a

policy identical with Exhibit A attached to the complaint.

IV.

Denies each and every allegation contained in Paragraph IV.

V.

Denies the allegations of Paragraph V except that the defendant admits that on the 30th day of September, 1926, the said Leslie J. Brownlee paid the defendant Nine Dollars ($9.00) which was the quarterly premium due on the policy of insurance referred to in Paragraph II of the complaint, and was sufficient to keep the said policy in force during the three months period immediately subsequent to the said date.

VI.

Admits the allegations of Paragraph VI.

VII.

Admits that the defendant has at all times denied its liability to pay the claim asserted by plaintiffs in their complaint. Denies the other allegations contained in Paragraph VII.

VIII.

Admits that plaintiffs have demanded from the defendant the payment of Five Thousand Dollars ($5000.00) and that the defendant has not made the said payment to plaintiffs. Denies each and every other allegation contained in Paragraph VIII.

IX.

Denies each and every allegation contained in Paragraph IX.

For a further and affirmative answer the defendant avers:

I.

That except for a payment made by Leslie J. Brownlee to the defendant on the 30th day of September, 1926, the policy of insurance issued by the defendant to the said Leslie J. Brownlee would have expired at noon on the 30th day of September, 1926.

II.

That in consideration of the payment by Leslie J. Brownlee to the defendant of Nine Dollars ($9.00) as a premium on the policy, copy of which is attached to the complaint as Exhibit A, on the 30th of September, 1926, the defendant issued to the said Leslie J. Brownlee a writing in words and figures as follows, to-wit:

"MUTUAL BENEFIT HEALTH AND ACCIDENT ASSOCIATION
OMAHA
2nd Floor Baird Bldg.

"This is an acknowledgment to the member to whom this card is addressed. File this receipt with your policy for future reference. Your address upon our records is the same as indicated upon the opposite side of this card. If you change your address or occupation notify the Association. The Mutual Benefit Health and Accident Ass'n in consideration of the payment of premium due, and subject to the provisions of policy held by Insured and the statements and answers in the application signed by the Insured, which the Insured by the acceptance of this receipt repeats and declares to be true and agrees shall be the basis of his contract of insurance, does hereby continue in force the said policy from the date hereof until twelve o'clock noon, standard time, Dec. 31, 1926, at which time the next quarterly payment will be due.

Countersigned this 30 day of Sept. 1926.
By H. K. COFFEY,
Local Treasurer.
Yours truly,
C. C. CRISS,
Treasurer."

III.

That the writing so delivered by the defendant to the said Leslie J. Brownlee was the last contract entered into between the defendant and the said Leslie J. Brownlee and that the policy of insurance, a copy of which is attached to the complaint as Exhibit A, expired and ceased to become operative and binding on the defendant at noon on the 31st of December, 1926. That at the said time the said Leslie J. Brownlee was sound and well and had sustained no injury against which the defendant had insured the said Leslie J. Brownlee. That the said Leslie J. Brownlee accepted the writing set forth in the second paragraph of this affirmative answer as a true and correct statement of the contract for the renewal of the policy of insurance, copy of which is attached as Exhibit A to the complaint.

WHEREFORE, having fully answered, the defendant demands judgment that plaintiffs take nothing by their action herein and that the defendant recover its costs and disbursements.

McCAMANT & THOMPSON
Attorneys for Defendant

District of Oregon,—ss.

I, HARRY K. COFFEY, being duly sworn do depose and say that the foregoing answer is true as I verily believe.

HARRY K. COFFEY

Subscribed and sworn to before me this 3rd day of January, 1928.

LYNDON L. MYERS
Notary Public for Oregon
(SEAL) My commission expires: April 30, 1929
Filed Jan. 5th, 1928—G. H. MARSH, Clerk

AND AFTERWARDS: TO-WIT ON THE 9th day of January, 1928, the plaintiffs filed their reply thereto in words and figures as follows, to-wit;

(TITLE OF COURT AND CAUSE)

Comes now the above named plaintiffs and for REPLY unto the further and affirmative answer contained in the defendant's answer herein Admits, Denies and Alleges as follows;

I.

Denies paragraph I thereof.

II.

Replying unto paragraph II thereof, plaintiffs denies the same, and each and every allegation therein contained as alleged, and alleges the facts to be that the said Leslie J. Brownlee paid to the defendant the sum of $9.00 on the 27th day of September, 1926, as payment in full of the quarterly premium for the quarter beginning at 12 Noon October, first, 1926, on the said policy mentioned in plaintiff's complaint herein.

III.

Replying unto paragraph III thereof, plaintiffs admit that the said Leslie J. Brownlee, deceased, was well and sound on the 31st day of December, 1926, but denies each and all other allegations therein contained.

WHEREFORE Plaintiffs pray as in their complaint.

ERNEST COLE
Attorney for Plaintiffs.

State of Oregon,
County of Multnomah,—ss.

I, Joseph Brownlee, being first duly sworn, say that I am one of the within named plaintiffs in the within entitled action, and that the foregoing reply is true as I verily believe.

JOSEPH BROWNLEE,

Subscribed and sworn to before me this 7th day of January, 1928.

(SEAL) ERNEST COLE,
Notary Public for Oregon,
My commission expires Nov. 1st, 1931.

Filed Jan. 9th, 1928—G. H. MARSH, Clerk.

AND AFTERWARDS, TO-WIT ON WEDNESDAY the 28th day of March, 1928, the same being the 21st Judicial day of the regular term of said court—Present, the HON. John H. McNary, UNITED STATES DISTRICT JUDGE, presiding—the following proceedings were had in said cause, to-wit; (TITLE OF COURT AND CAUSE) No. L. 10264.

March 28th, 1928

NOW at this day come the plaintiffs by Mr. Ernest Cole of counsel and the defendant by Mr. Wallace McCamant and Mr. Ralph H. King of counsel; WHEREUPON the jury impaneled herein being present and answering to their names, with the exception of Paul C. Stevens, who was duly excused from further consideration of this cause, the trial of said cause is resumed, and said jury having heard the evidence adduced, and both parties having rested their cases, the defendant moves the court for a directed verdict in its favor; and the court having heard the argument of counsel and being fully advised in the premises;

IT IS ORDERED That the said motion be and the same is hereby allowed; Whereupon the jury, by the direction of the court without retiring from the jury box, returns its verdict in words and figures as follows, to-wit;

WE, the jury duly impaneled and sworn to try the above entitled cause find a verdict for the defendant by the direction of the court.

ALBERT RICH, Foreman.

which verdict is received by the court and ordered to be filed;

WHEREUPON, on motion of defendant for judgment upon said verdict;

IT IS ADJUDGED that plaintiff take nothing by this action, that defendant go hence without day, and that said defendant do have and recover of and from said plaintiffs, its costs and disbursements herein taxed in the sum of $86.20, and that execution issue therefor. Filed March 28, 1928. G. H. MARSH, Clerk

AND AFTERWARDS, To-wit, on the 5th day of April, 1928, there was duly filed in said court a Notice of Appeal, in words and figures as follows, to-wit;

(TITLE OF COURT AND CAUSE)

NOTICE OF APPEAL

To the above named defendant, MUTUAL BENEFIT HEALTH AND ACCIDENT ASSOCIATION, and to McCamant and Thompson, your attorneys of record and each of you;

YOU and each of you will please take notice that the above named plaintiffs, Joseph Brownlee and Barbara Brownlee, hereby appeals to the CIRCUIT COURT OF APPEALS OF THE UNITED STATES FOR THE NINTH JUDICIAL CIRCUIT, from the VERDICT AND JUDGMENT

rendered, made and entered in the above entitled action, IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON in favor of the above named defendant, Mutual Benefit Health and Accident Association, and against the above named plaintiffs, Joseph Brownlee and Barbara Brownlee, on the 28th day of March, 1928, and from the whole thereof.

Dated this 5th day of April, 1928.

ERNEST COLE,
Attorney for plaintiffs.

District of Oregon,—ss.

Due service accepted hereon this 5th day of April, 1928.

WALLACE McCAMANT
of attorneys for defendant.

Filed April 5th, 1928—G. H. MARSH, Clerk.

AND AFTERWARDS, to-wit, on the 6th day of April, there was duly filed in said court an amended assignments of errors, in words and figures as follows, to-wit;

(TITLE OF COURT AND CAUSE)

TO THE HONORABLE JUDGES OF THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

The plaintiffs and appellants above named, Joseph Brownlee and Barbara Brownlee, pursuant to notice of appeal given herein, makes and files the following assignments of errors, to-wit;

I.

That the above entitled cause come on regularly for trial in the District Court of the United States for the District of Oregon, and on the 27th day of March, 1928, and that during the trial of said cause the follow-

ing proceedings were had upon which the appellants above named make their assignments of errors herein upon this appeal.

II.

That during the trial of said cause the court erred in refusing to allow the witness E. J. Sickler to testify as to what the witness A. A. Feyerabend stated to him as to the time and place he last seen and left the insured Leslie J. Brownlee on Mount Hood, upon his arrival at Battle Axe Inn on Jan. 1st, 1927, at the hour of 4:30 P. M.

III.

That the court erred in directing a verdict for the defendant, as disclosed by the record.

IV.

That the court erred in entering a judgment for the defendant, as disclosed by the record.

V.

That the verdict and judgment entered herein in favor of the defendant are contrary to law.

VI.

All of the foregoing errors will be made to appear more fully to your Honors by a transcript of the record which will be transmitted to this court in due time.

WHEREFORE the appellants herein by reason of the above assigned errors, prays that same be reversed and that justice be done to the parties herein.

Dated at Portland, Oregon, this 5th day of April, 1928.

ERNEST COLE,
Attorney for appellants and plaintiffs.

State of Oregon,
County of Multnomah,—ss.

Due service of the within assignment of errors is hereby accepted in Multnomah county, Oregon, this 5th day of April, 1928, by receiving a copy thereof,

duly certified to as such by Ernest Cole attorney for plaintiffs.

McCAMANT & THOMPSON,
Attorneys for defendant.

Filed April 6th, 1928—G. H. MARSH, Clerk.

AND AFTERWARDS, to-wit, on the 10th day of April, 1928, there was duly filed in said court an undertaking on appeal and stay of execution, in words and figures as follows, to-wit;

(TITLE OF COURT AND CAUSE)

WHEREAS Joseph Brownlee and Barbara Brownlee, plaintiffs above named have appealed to the UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT, from that certain Verdict and judgment duly given, made and entered in said action, which judgment is in favor of the above named defendant, Mutual Benefit Health and Accident Association, and is against the plaintiffs, Joseph Brownlee and Barbara Brownlee, the appellants above named for the sum of $86.20 as costs and disbursements incurred by the said defendant, Mutual Benefit Health and Accident Association, and that the said plaintiffs above named are desirous of giving an undertaking both on said appeal and for stay of proceedings on the said judgment;

NOW THEREFORE, Know all men by these presents; that We, the undersigned, Joseph Brownlee and Barbara Brownlee, as principals and the UNITED STATES FIDELITY & GUARANTY COMPANY, as surety, in consideration of said premises and of the said appeal, do hereby acknowledge ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally firmly bound unto the said Mutual Benefit Health and Accident Association, defendant in the above entitled cause and

court and respondents on this appeal, and do promise to the effect that the appellants, Joseph Brownlee and Barbara Brownlee, will pay all costs and disbursements and damages that may be awarded against them on the said appeal, and;

WHEREAS the said Joseph Brownlee and Barbara Brownlee are further desirous of executing an undertaking for the stay of the proceedings on the judgment so appealed from pending such appeal,

NOW THEREFORE, WE, the said Joseph Brownlee and Barbara Brownlee, as principals and the UNITED STATES FIDELITY & GUARANTY COMPANY, as surety, do hereby further covenant and agree on behalf of ourselves, our and each of our heirs, executors, administrators, successors and assigns, that in consideration of the stay of execution and the proceedings in the above entitled cause and court on the said judgment so appealed from, the appellants will satisfy any judgment that may be given against them in the appellate court on the said appeal.

IN WITNESS WHEREOF, WE, THE SAID Joseph Brownlee and Barbara Brownlee, as principals, and the UNITED STATES FIDELITY & GUARANTY COMPANY, as surety, have caused our names and seals to be hereto attached and have signed these bonds this 7th day of April, 1928.

JOSEPH BROWNLEE,
BARBARA W. BROWNLEE,
Principals.

Approved:
JOHN H. McNARY,
Judge.
UNITED STATES FIDELITY & GUARANTY COMPANY.

By DOUGLAS R. TATE,
Its Attorney in Fact.
Surety.
(Seal)

State of Oregon,
County of Multnomah,—ss.

Due service of the within undertaking on appeal is hereby accepted in Multnomah County, Oregon, this 10th day of April, 1928, by receiving a copy thereof duly certified to as such by Ernest Cole, Attorney for plaintiffs and appellants.

McCAMANT & THOMPSON,
Attorneys for Defendant and Respondent.

Filed April 10th, 1928—G. H. MARSH, Clerk.

AND AFTERWARDS, to-wit, on the 18th day of April, 1928, there was duly filed in said court a Bill of Exceptions in words and figures as follows, to-wit:

BILL OF EXCEPTIONS

(Title of Court and Cause)

BE IT REMEMBERED that the above entitled cause came on for trial in the United States District Court for the District of Oregon, before a jury duly impaneled and sworn, Hon. John H. McNary presiding, plaintiffs appearing in person and by their attorney Ernest Cole, and the defendant being represented and appearing by its attorneys, Messrs. Wallace McCamant and Ralph H. King, on Tuesday, the 27th day of March, 1928, and the following proceedings were had:

AL FEYERABEND was called as a witness on behalf of the plaintiffs, and being first duly sworn, testified that he had known Leslie J. Brownlee for about five years prior to December 31st, 1926, and had lived together for three or four years and were chums

and friends; that they had made many trips together; that they had climbed Mt. Hood several times, the last time being July 4, 1926, and also Mt. Jefferson; that several months prior to January 1st, 1927, they had planned to be the first on top of Mt. Hood on January 1st, 1927, and had accumulated material for the purpose, and that Mr. Sickler, who is Manager of Battle Axe Inn at Government Camp, took them up to Battle Axe Inn, which is located on the south side of Mt. Hood at an elevation of about 4000 feet, on the afternoon of December 31st, 1926, where they arrived between seven and eight o'clock in the afternoon of December 31st, 1926; that the elevation of Mt. Hood is 11,225 feet, and that they left Battle Axe Inn for the ascent of Mt. Hood at ten o'clock that evening of December 31st, 1926; that they were both dressed practically the same, each wearing heavy woolen underwear, woolen hiking trousers, two pair of woolen socks, rubber shoe packs, woolen shirts, two sweaters, and over that marine suits which made them waterproof from head to foot; that each carried a packsack in which were four thermos bottles, two of them filled with hot tomato soup, one with hot tea, and one with a lukewarm solution of orange and lemon juice, and that witness had in addition thereto six smoke bombs that they intended setting off on the top of Mt. Hood; that they wore snowshoes from Battle Axe Inn to Timber Line Cabin, a distance of about four miles; that Timber Line Cabin is about 6,000 feet in elevation; that at the time of their arrival at Timber Line Cabin there was no rain, but the sky was overcast; that he does not remember exactly, but it was after one o'clock on the morning of January 1st, 1927, when they reached Timber Line Cabin, at which place they rested one hour; that they then pro-

ceeded up Mt. Hood, wearing their snowshoes for a short distance until they were above the timber; that the weather conditions were about the same, the sky was still overcast and the clouds were quite low, and it was so dark that they were unable to distinguish the outline of the mountain until approximately five o'clock in the morning; that Leslie J. Brownlee had snowshoes of unique style, which the witness had never seen or heard of being in Portland, called "Beavertail"; and was the only one of its kind that anyone knew of around Mt. Hood; that when they reached the hard snow above the timber line they changed from snowshoes to ice creepers, sometimes called "Crampons"; that the change was made on account of the snowshoes being cumbersome and liable to slip on the ice; that crampons are mountain climbing equipment consisting of frame work practically the shape of a shoe on which there are some long spikes about an inch long and quite sharp, which prevent slipping on the icy surfaces. They are made for use on glaciers and higher altitudes on mountains. That they did not make better time with the crampons because they were travelling at a very slow rate of speed; that crampons were safer in that vicinity of the mountain; that they had made the crampons themselves and were anxious to try them.

That in ascending the mountain there is no trail, but there is a general route used by climbers; that White River Canyon is on the extreme east of the mountain; on the east slope of the mountain; that they selected a course probably half way between White River Canyon and Zigzag Canyon—Zigzag Glacier; that the storm seemed to get worse as they rose to higher altitudes; that they had been travelling all night with the exception of an hour; that they were

not more tired than in the summer; that they had no way of following a direct line, although they carried a compass, but the compass is something that they seldom resorted to; that there was a space probably three-fourths of a mile in width between the two dangerous sections of the mountain—that is Palmer Glacier is one dangerous section, which is to the extreme right, and Zigzag Glacier is on the extreme left; that they had probably three-fourths of a mile, or perhaps more, space between the two, so it really didn't matter as to the exact course which they pursued, but due to the storm they could not see very far and their direction was selected in two ways—they would keep going up hill and would follow from one dark rock to another, because on a steep slope the upper side of the rock is bridged over with snow and the bottom side as a rule is left bare; that they would follow from one rock to another, stopping occasionally for breath and to drink some of the stuff they carried in their thermos bottles, until they got to a place which they thought was White River Canyon, and which, no doubt, was White River Canyon; that they could not see anything nor get the general lay of any place which they could recognize, but they could see the edge of the canyon and beyond that there was a deep blue, which would, of course, signify quite a depth or quite a vast space, and by this they thought they knew approximately where they were and felt sure they did, and they continued up along the edge of this canyon, keeping far enough away so that they would not be apt to fall into it, until they came to quite a high rise of ground, and in previous trips they had always thought that a certain moraine, known as Triangle Moraine, which is probably the highest point along the south edge of White River Glacier and sticks up

as kind of a knoll separate from the rest of the terrane, was in a direct line east and west with Crater Rock, and that if they would drop over toward the left, they would be in the swale that would lead them into the crater and from there the climb would consist of merely following around Crater Rock, and there would be no trouble to get to the top because the areas are confined to smaller dimensions and they are not as hard to follow; that they went around this rise thinking they were heading in the right direction, and continued for quite a while to their left, which would be west; that at that time they were climbing to a certain extent, because they did not want to travel on a level, but they did not seem to get into the swale, and they became discouraged and used a compass line running due north, and were travelling in that direction when Leslie Brownlee decided he would go back; that at the time he determined to go back, Leslie seemed tired, but seemed in pretty good shape, but seemed as though he did not feel like the climb was worth the effort; that Leslie was tired, but he did not seem to be more so than a fellow usually is when he decides he has gone far enough and wants to go back; that at the place where Leslie turned back they talked for a little while; that it was more or less of a surprise to the witness that Leslie was going to turn back; that they had been using the compass and that they stopped for just a short while because it was quite cold. Witness believes they took a drink of soup and that then Leslie asked witness for the compass; asked witness if he had the compass and could get along without it. That witness told Leslie that he could get along without it and Leslie wanted to use it and witness let him have it; that Leslie asked witness if the

course was south and witness told him "yes," that the south course would take him out to the Highway; that at that time it was storming; it was as bad as during the whole trip; very stormy; that the higher up in the mountain the worse the storm became; that you could not see any distance; that you could not see anything in front of you because there were no dark objects up in that altitude; the down side of the rocks was blown with kind of an ice formation, which looks like a bunch of bananas hanging on all the rocks which projected.

That Leslie started down the mountain and witness started to continue climbing, because he and Leslie had made a brass plate which they intended to put on top of the mountain, and they had agreed that if one could not make it, the other one would continue the climb; that witness felt that he could make the top and continued, but being alone witness' spirit was more or less broken and he did not feel safe; he did not feel like he cared to make the effort either. He hesitated several times, and in fact turned back several steps at different times until he finally made up his mind that he had better go back, because he could not tell the time or anything. He had his watch, but he did not look at it. It was underneath his other clothes and it was quite an effort to take the watch out. Leslie had a wrist watch which he used more than witness used his. That witness has no idea how long he travelled after he separated from Leslie, but it seemed like quite a long time because of the weather conditions; it is hard to say how long it was; witness does not know how long it was. A minute up there seems like thirty under ordinary circumstances. It would be hard to say how long it was. To witness it probably seemed as long as an hour; it may have

been more than an hour or less than an hour; it is hard to say. It was quite a long time; it seemed like it might be an hour. It would be hard to say how far witness had walked, because there is no way of comparing.

That after witness turned back, he had no way of proceeding except to go down hill. He thought he knew where he was. He thought he was in a swale at the head of White River Canyon—White River Glacier between Crater Rock and Steel Cliffs, pretty close to the crater itself. In altitude it might be a thousand feet from the top. He does not know. He thought he had only a few hundred yards further to go to get into the crater when he turned around. That in returning he was badly confused once; when he started down he was using the wind, keeping the wind on his right cheek, but he became quite confused after he had gone quite a distance, because the wind seemed to come from all directions, so he started following a down hill course and continued that course until he came to a place where it seemed to be more or less level, where he thought he saw timber, but that proved to be a mirage; it was not timber; it was nothing. That he started to run and fell upon his face. He then realized that if he did not snap out of it, he would not be able to get off the mountain. He drank a thermos bottle full of soup and regained control of his nerves, and then continued on down the slope. That when he had reached a lower altitude something caused the clouds to whip up, and he located himself from land marks that had always been familiar to him climbing the south side; that he realized he was too far west and started to swing over to the east; that the land mark which he recognized is a snow slide which sloped off one of the big canyons and has trees

sticking up on all sides forming a perfect triangle, which from the top of the mountain, looks like a tennis court; that Mississippi Head was in a direct line with this strip of land when he located himself. It would be hard to say how far he was from Mississippi Head when he located himself. He was high enough up on the mountain so that when he swung to the east he did not have to cross any large canyons. That in coming to the place where he located himself from the point where he turned around, witness cannot say whether he at any time went up hill or not; he does not know. That the weather continued practically the same in his descent of the mountain until he reached a lower altitude around about 7,000 feet. He thinks it probably cleared at that altitude. That when he located himself, he pursued a direction quite a bit east of southeast, heading for the ridge that Timber Line Cabin was on; he was quite a ways to the west from where he and Brownlee had started; he had veered over quite a ways from the path he had taken going up; that he wore his crampons all the time until he located himself, at which time he changed to snowshoes. It did not take very long to change, because they had adjustable straps on their crampons. The change was made a ways above timber line. After he changed to snowshoes, he took a direction a little east of southeast. He was making fairly good time as it was down hill and the going was not hard. He had been out such a length of time that he was not able to see the ground in front of him; directly in front, and could not tell when he took a step whether the ground was level or irregular. The only objects which could be seen on the whole climb were dark objects like the dark surfaces of rocks, and the rest of it was all a kind of a glare. You could not tell where

the sky and ground left off, or whether the ground was level. These facts did not make him careful in travelling because he figured he knew his location by that time and was sure of the territory, and so this did not slow him down because he did not care very much as long as he was moving down hill and going in the right direction. He did not know of anything dangerous that would be directly in his path the way he was moving at the time. That was after he put on the snowshoes. The weather and the position he was in prior to putting on the snowshoes did not make a great deal of difference, because the only thing one could see would be like he spoke of a while ago; White River that you could see the deep blue, and if you got right up close to the canyon there, you wouldn't be able to see it as well as if you were, say, twenty or thirty feet away. There is no such thing as a trail on the mountain in the winter. Evidently a lot of snow had fallen, but it was good footing—probably because it was so cold. It was ice. After locating himself, he took a direction a little east of southeast, making for the ridge that Timber Line Cabin is on. He had no difficulty in reaching Timber line Cabin from the place where he located himself. He kept going on this course, which was really around the mountain towards the east, until a while later when the clouds raised again, because he was at a lower altitude. That he did not have to go around any canyons on his way down; that he got into only one small canyon, which was about ten or twelve feet deep. He had been walking, carrying his ice ax lashed to his wrist, so in the event he slipped into a canyon or started to fall, he could stick the ax in as he was falling. That he slipped into one small canyon before he saw it, and as he fell, he pushed in his ice ax, which held him at the end of

the thong. He was quite careful in letting himself down but there were only about three feet below him to the bottom of the canyon. That when he reached Timber Line Cabin he stopped there a short while; that there was an old gentleman in front of the cabin and a couple of young fellows, probably sixteen or eighteen years old, were skiing; that he thought Leslie had gone down there and he inquired of the old gentleman about Leslie and described Leslie to him; that the old gentleman said four chaps had gone down the trail, and he did not know but what Leslie was one of them, because there was a man dressed something like the witness described; that he and Leslie had changed their clothes at Battle Axe Inn, and left their street clothes and valuables, with the exception of their watches, at Battle Axe Inn; that the clothes they were wearing were fit only for mountain service; that he arrived at Battle Axe Inn around four-thirty in the afternoon of January 1st, 1927; that it has always been a quandary with the witness as to the time when he separated from Leslie; that he remembers distinctly eleven-thirty A. M., but he cannot connect eleven-thirty with any particular location or event; that he is not sure that it was about that time; he does not know where the eleven-thirty took place; that when he arrived at Government Camp Mr. Sickler was there and there were some other people with whom he was not acquainted.

That witness believes it was around four-thirty in the afternoon when he reached Government Camp; he does not remember exactly; that he has no way of knowing the vicinity in which he left Leslie; that he has been up there in the summer and of course the terrain changes quite a bit between winter and summer; that he and Leslie were both climbing a very

steep slope at the time they separated; that he does not remember whether his mind was clear prior to the time that he thought anything had happened to Leslie; that he does not know whether he had a clear memory as to the time when he separated from Leslie prior to learning that something had happened to Leslie; he cannot remember because there are a lot of other things which confused him later on and out of a lot of incidents that took place, he does not remember; that his mental condition was all right when he got back to Government Camp and talked to Mr. Sickler; he has no present recollection and that he does not know whether, at the time he reached Government Camp, his recollection was clear as to the time when he and Leslie separated; that he does not have a clear recollection of when he separated from Brownlee. He does not know. If he ever had a clear recollection it would be before the search started. At the time when he arrived at Government Camp he thinks he did have a clear recollection. He does not remember the things that took place before reaching Government Camp because of the strain of the days that followed, since he cannot remember now. He does not remember whether he remembered at the time he reached Government Camp or not the time when he separated from Leslie. He has forgotten all of these things. He has never seen Leslie since. He made a search for him. In making the search, he went up around the places which he has described and over the entire south slope of the mountain. It was somewhere about four-thirty in the afternoon of January 1st, 1927, when he arrived back at Government Camp. Different persons were with him when he was making the searches on the mountain. Most of his search was conducted from the south rim of White River Canyon

to Timber Line Cabin which at that time was the most logical place to look for him because of compass bearings he was supposed to have followed; that the searchers worked in different parties according to assignment; that witness was not able to get up around the vicinity where he left Leslie because of the storm, which lasted practically a week. He thinks it was one or two days less than a week. That he has been up on the mountain since that time; that in some locations there is still snow and ice; perpetual snow and ice in some places; that after reaching a certain altitude, it would be more or less necessary to keep moving in order to keep from freezing; that you could not sit in any one position for any length of time; that you would be frozen if you would sit down for any length of time. That when he located himself in his descent of the mountain, he was well above Mississippi Head; that he made an account of the trip to Mr. Sickler after he returned to Battle Axe Inn, which statement was correct.

CROSS EXAMINATION OF AL FEYERABEND

Upon cross examination the witness testified that he arrived back at Battle Axe Inn at Government Camp at four-thirty in the afternoon of January 1st, 1927, and that shortly afterwards he had timed himself as to how long it took him to come down from Timber Line Cabin to Battle Axe Inn and found it to be one hour and fifteen minutes, but the trail was well broken; that he does not know how long it took him to make that distance on January 1, 1927, when coming back, but that his best estimate is that it took him approximately an hour and forty-five minutes; that his best judgment is that he left Timber Line

Cabin about two forty-five P. M. on his return trip on the afternoon of January 1st, 1927; that on his return trip he stopped at Timber Line Cabin long enough to ask the man a question or two; that he did not enter the cabin at all.

That on the upward ascent of the mountain they left Timber Line Cabin about two-thirty in the morning; that they looked at their watches when they left; that about six in the morning he and Leslie Brownlee holed in to rest; that it was about seven o'clock when they ceased resting and started on; that he is sure of this hour; that he believes that after resting and prior to starting on at seven o'clock, they took a small portion of soup and also some hot tea; that it would be very difficult to say how far they had gone up the mountain between two-thirty and six o'clock in the morning, but he thinks it was a quite a distance; that it was up hill all the way from Timber Line Cabin and they were making slow progress because they realized they had quite a long journey ahead of them and were saving their strength; that at some time subsequent to starting on after holing in, he and Leslie Brownlee stopped for lunch; that at that time they each ate half of one sandwich; that witness cannot fix the time when they ate the luncheon; that after they ate lunch it seemed quite a while before Leslie Brownlee turned back, but he has no way of telling just how long or no way of making an estimate even; that at the time Leslie Brownlee turned back he seemed to be in good physical condition other than that he was tired, which was nothing unusual, because there are many people, even in the summer time, who turn back after going to where they think they have had enough of the climb; that there was nothing in his condition that alarmed the witness

as to his safety; that Brownlee talked very sensibly and quietly and acted normal other than that he was very tired from the climb. Witness thinks that Leslie Brownlee had made two complete trips to Mt. Hood. Witness knows that he made one complete trip, and he and witness had made one or two incomplete trips, one of them being to Crater Rock and one to probably as far as Triangle Moraine. That he and witness had climbed to the top of Mt. Jefferson; that Leslie Brownlee was quite muscular, but he wasn't of a wiry build, and although he could stand a lot of hiking and could hike a long distance, it was more persistence than anything else which carried him thru. He was not a quitter. Leslie was not nervous, but was well poised.

It is very difficult for witness to say how long he continued the ascent of the mountain after Leslie turned back. There are no landmarks recognizable that would give witness any idea as to the distance he travelled. Witness did not consult his watch. It seemed like quite a long time. That when witness turned back, he knew the general lay of the mountain and thought he knew his approximate location, and if he had been in that location, by going straight down the mountain he would not have encountered any crevasses or any points of danger on the course until he got to such a low altitude that he would have been able to see, and since he was under this impression, he was only interested in getting one foot below the other and was making fairly good time all the way until he finally came to a place that seemed to be level, —that is, there was no slope to the ground, with the exception of occasional rolls, and he became confused at this particular place and started to run and fell on his face; that the shock brought him to the realization

of the danger of losing his head under these conditions and he sat down and took some hot soup and this again composed his senses, and he took it more easily from then on; that he was making fairly good time; that he got back to Timber Line Cabin approximately two-forty-five P. M.; that he can recall the hour of eleven-thirty A. M. which had some connection evidently with the mountain, but things that happened afterwards have confused him more or less regarding it and he cannot place it as to the location or the event,—it might have been that he was planning on reaching the top at that time, because if he is not mistaken, he had requested Mr. Sickler to watch the mountain top about that time for a smoke signal that they would set off if they reached the top; that he remembers the hour of eleven-thirty, but he cannot connect it; that he saw the party below them climbing the mountain,—he believes they saw them on two or three occasions; that twice he thought there were three in the party below, but on the third time he saw them there were four; that he and Leslie discussed it and they figured that the party below was probably two hours behind; that he thinks he got in the immediate vicinity of Crater Rock on that day, but he was never into the crater; that he was very close to it! that if he had gone to the west of Crater Rock, then he could have gone above the crater by perhaps several hundred feet, which would run probably around ten thousand feet; in elevation; that he thinks he was up about ten thousand feet; that it would be very difficult to say how high they were when he and Leslie separated; that there was practically a continual fall of snow from and after the first of January, in the days immediately following, up on the higher levels of the mountain; that a kind of rice snow fell while he was descending the

mountain; that there was a lot of snow coming down while he was descending the mountain and the wind was blowing it, whipping it around and drifting it; that he cannot give the distance that the next party was below he and Leslie, because they were discussing it in the matter of time and not in distance; that it is pretty close to four miles from Timber Line Cabin to the top of the mountain by the usual route, and it is approximately four miles from Timber Line Cabin to Government Camp where Battle Axe Inn is located.

RE-DIRECT EXAMINATION

On re-direct examination the witness testified that he would be unable to say how far it was from Timber Line Cabin to the place where he turned back by the way in which he returned; that in returning he swung quite a bit to the west; that the distance by the route in which he returned was further than a direct route.

RE-CROSS EXAMINATION

Upon re-cross examination the witness testified that he was not sure how much further it would be; it would be like a triangle drawn from Crater Rock to Mississippi Head, and from Timber Line Cabin to the third corner of the triangle, and the hypotenuse which he travelled in going up was the distance from Timber Line Cabin to Crater Rock, and the way he came down would be the two legs of the triangle from Crater Rock to Mississippi Head and then to Timber Line Cabin.

That at the time he separated from Leslie Brownlee, Leslie, who was perhaps ten or fifteen feet behind, called to him and witness waited until he caught up, and then Leslie said that he did not think he could

make it and that he thought he would go back, that Leslie did not mention the storm; that witness asked Leslie if he was sick and that Leslie said that he was not; that they hesitated a little while, and Leslie then told the witness to go on and keep the agreement and go to the top if witness wanted to; that witness told Leslie he would like to try it, whereupon Leslie asked witness if he could use witness' compass; that witness gave the compass to him and assured Leslie that he could get along without it; that then Leslie turned and started down.

EVERETT J. SICKLER was called as a witness on behalf of the plaintiffs, and being first duly sworn, testified that he lived at Battle Axe Inn and that he took Al Feyerabend and Leslie Brownlee from Portland to Battle Axe Inn on December 31st, 1926, and that they left Battle Axe Inn to ascend the mountain about ten o'clock in the evening of that date, and that he fixed them up a lunch consisting of four thermos bottles consisting of soup and black tea and that they left their dress clothes with him; that Al Feyerabend returned to Battle Axe Inn the next night, January 1st, 1927, at approximately four-thirty, and that Leslie Brownlee was not with him, and that he never did see Leslie Brownlee again; that he was at the hotel or Battle Axe Inn for the next week following January 1st, 1927, and would have seen Leslie Brownlee if he had come back that way, and that he never returned for his clothes which he left with him; that during the examination of said witness the following questions were asked and proceedings had, to-wit:

Q. Now did Mr. Feyerabend, when he came back—did you ask him anything about Mr. Brownlee?

A. Yes.

Q. Did he make a detailed statement to you at that time?

A. Yes sir.

Mr. McCamant: I object to that as irrelevant and immaterial.

Court: Whether or not he made a statement I think would be competent. You can ask that question.

Q. What was the statement that he made?

Mr. McCamant; I object to that as hearsay and incompetent.

Court: Objection sustained.

Mr Cole: * * * I wish to save an exception, and I would like to make an offer of proof of what he would testify.

(Offer of proof made as follows, in the absence of the jury: "We offer to prove by this detailed statement that he said that he left Leslie Brownlee at the hour of Eleven O'clock, and that Leslie looked at his watch at the time he left him, and said to him that it was eleven o'clock; and that it was in the vicinity of Crater Rock, just below.

Mr. King: To which offer defendant objects on the ground that it is irrelevant and immaterial and is hearsay.)

EXCEPTION NO. I.

To which ruling of the court the plaintiffs herein do now except, which exception is allowed by the court.

NO CROSS EXAMINATION

MISS HELEN DIMMICK was called as a witness on behalf of plaintiffs and being first duly sworn,

testified that she lived in Portland, Oregon; that she made a trip up Mt. Hood on January 1st, 1927, with three friends; that they left Battle Axe Inn at Government Camp between midnight December 31st, and twelve-thirty in the morning of January 1st; that they got about between a quarter of a mile and three-quarters of a mile below Crater Rock; that they do not know how far they got, but estimated approximately between a quarter and three-quarters of a mile below Crater Rock; that it was eleven o'clock in the morning of January 1, 1927, when they arrived at the point where they turned back; that while they were climbing the mountain they saw persons in front of them; they did not know the names and could not tell whether they were men or women; that they did not know exactly the distance the two persons were ahead; that they saw them after daylight and between daylight and the time the storm came up; that they never caught up with anyone; that the weather conditions were terrible at eleven o'clock when they turned around to come back,—it was storming; that they did not catch up with these persons at the time they turned around to come back; that the last time when they saw them was when the storm became such that they could not see them anymore,—witness would judge that was around nine o'clock in the morning; that there was no trail up the mountain, but they followed the usual route in the ascent of the mountain.

CROSS EXAMINATION

Upon cross examination the witness testified that she had never made an ascent of a mountain under similar conditions; that the names of the other members of her party were LaVerne Coleman, B. W. Clarke and Helen Hansen; that they had on hiking

clothes; that they didn't leave from either Battle Axe Inn or Government Camp Hotel, but just drove up to Government Camp in a car and immediately started out for Timber Line Cabin; that they started from Government Camp about midnight of December 31st; that witness does not know the time they reached Timber Line Cabin; that witness knows the time when they left; that they left from Timber Line Cabin at six-twenty A. M.; that it was not daylight then; that they stopped at Timber Line Cabin to rest for an hour or so; that witness could not say definitely when they reached Timber Line Cabin; that witness does not remember seeing any lights on the mountain after leaving Timber Line Cabin; that witness believes it became daylight around seven or after; that witness does not know how long after daylight it was when they saw the two persons ahead of them; that witness has no idea as to the exact time; that when they first saw the persons ahead, they thought them to be rocks; that the persons ahead seemed to be travelling at a slow rate and they could see them plainer; that they were gaining on .the persons ahead.

EDWARD PHILLIPS was called as a witness on behalf of the plaintiffs, and being first duly sworn, testified that his business was carpenter and mountain guiding and was familiar with the territory on Mt. Hood, in fact quite familiar with it, and drew a rough sketch of the map of Mt. Hood and the locations mentioned in the testimony herein given; that he testified that Battle Axe Inn at Government Camp was about four thousand feet in elevation; that Timber Line Cabin was about six thousand feet in elevation; and that Crater Rock is approximately ten thousand feet in elevation and less than half mile in fact about 1750 feet from the top of the mountain, and that it is ap-

proximately eight miles from Government Camp to the top of Mt. Hood, or a trifle over; that the witness pointed out the location and place of Battle Axe Inn, Timber Line Cabin, Crater Rock, Mississippi Head and the top of the mountain on the sketch drawn by the witness to the jury; that Crater Rock is reached by a ridge which follows along up close to the edge of White River Canyon, and that White River Canyon contains White River Glacier and the sides of the canyon are very steep, precipitous, especially in the winter time when the snow has drifted in and filled with cornices and combings; that White River Glacier is very rough and ragged, in the summer time at least it is lined with crevasses, big cracks, humps and hollows; these may or may not be bridged over by snow in the winter time; to the left or west of Crater Rock lies the head of Zigzag and Reid Glaciers; Reid Glacier sloping off fairly straight towards the west, while Zigzag Glacier lies south and west from Crater Rock; these latter likewise are lined with crevasses; that as we get over towards Mississippi Head we come to canyons leading into Big Zigzag; that Big Zigzag river heads directly below Mississippi Head, and that there are three or four large canyons, deep and precipitous sides around Mississippi Head and below it; that at any place on the face of the mountain, and especially toward the foot of the Glacier and along the ridges and edge of the canyons, or any place along the canyon, cornices form by drifting action of the snow being blown by the wind; these vary in size and height and in danger; likewise are wind crevasses formed in the snow, sometimes as much as fifty or sixty feet deep, with sides almost if not quite precipitous. Both Reid and Zigzag Glaciers contain quite a few crevasses; that the climbing line below Crater Rock

is safe if a person confines himself to a narrow path, but if they drift to either side of that they are in danger, as on one side is White River Canyon and White River Glacier, as White River Glacier is in the head of White River Canyon, and on this side, pointing to the sketch, they will find deep snow fields that has some crevasses in it; that it is by no means as easy to travel over that part of the mountain above timber line cabin as it is that part below, and that a man cannot travel "nothing like as fast," above Timber Line Cabin as he can below; that crevasses at any point on the mountain catch the snow more or less in the winter time, and at times are filled solid with snow and at other times will be just a light bridge, but that the wind and snow crevasses are changing all the time and are formed and reformed each winter; that the difference in distance between a direct line from Crater Rock to Timber Line Cabin and one from Crater Rock to Timber Line Cabin by the way of Mississippi Head would be about one and a half miles further; that he put in considerable time in the search both last winter and during the summer, and that most of his search work was done above timber line, with the idea of searching the section of the country above the edge of the timber and in the more dangerous territory, although he made some search below and made two trips down as far as the highway; that he started to search Sunday, January 2nd, and got as far as Timber Line Cabin, and on Monday started for Mississippi Head and found that if not impossible, by all means impracticable and turned back, finding a great deal of snow, some fresh and some which had been on the ground for some time; that White River Canyon heads right at the left side of Crater Rock and extends over to the east and crosses the Loop Highway some

distance down at an elevation of about 4200 feet, and beyond White River Canyon there is a high bluff with precipitous slope which would be next to impossible, if not impossible, for a man to climb, and the country between White River and directly south of Government Camp, contains the head of Salmon River, and several different forks of Salmon River which run together just below Timber Line; that he helped search White River Canyon from timber line to a quarter of a mile on the head of Triangle Moraine on Friday following the 1st day of January; that he also searched for Leslie Brownlee below timber line along Big Zigzag River and from there into Zigzag River Valley until he came to the highway, and found one set of tracks made by "Bear Claw" snowshoes; that he followed the search beginning on January 2nd, on Sunday afternoon, Monday, Tuesday, Wednesday, Thursday and Friday, and that the weather conditions above timber line during Monday and Tuesday was a blizzard, and that the highest point he made in his search during said time was approximately eight thousand feet which was on Thursday; that on Tuesday he went over to a point somewhat below Mississippi Head, where he could look down into the ravine below Mississippi Head and examine the cornices and make whatever search was possible for the body.

CROSS-EXAMINATION

Upon the cross-examination of the witness he testified that by the end of winter the ice crevasses are covered over with snow, either fill up or bridge over, and that many snow crevasses are formed in the deep snowfields by the action of the wind under blizzard conditions, which is more like a whirlwind on the mountain; that he continued to search the mountain

during the year 1927 with a view to finding the remains of Leslie Brownlee and that all the snow at the foot of Mississippi Head had disappeared before Fall and that he was there after all the snow had gone, but he did not find the remains of Leslie Brownlee; that on certain parts of the mountain the snow is perpetual, and that it is very much heavier well upon the mountain than at Government Camp; that there had fallen a great deal of snow on January 1st, Sunday the 2nd and Monday the 3rd, and also on Tuesday the 4th; Thursday the 6th was extreme blizzard conditions and a heavy snow fall; that on Monday there was about two foot of snow at Timber Line Cabin and on Friday of that week about five feet had fallen, but that the snow drifts on the upper levels of the mountain, as it tends to drift into the canyons and off the ridges; that in the summer time the snow is all gone to a considerable distance above timber line.

REDIRECT EXAMINATION

Upon redirect examination the witness testified that during the summer of 1927 all the snow had gone at points around Crater Rock, but that there was considerable ground right at the close vicinity of Crater Rock which was covered with snow, some of it he estimated to be forty or fifty feet deep at the time fresh snow started in the Fall, and that there were crevasses in this snow.

STIPULATION

It is stipulated by and between the parties that the policy of insurance attached as Exhibit "A" to the complaint continued in force down to noon of the first day of January, 1927, and expired at that time.

FRED W. STADTER was called as a witness

on behalf of the plaintiffs and being first duly sworn, testified that he was a Municipal Judge of Portland, Oregon, and was familiar with the territory around Mt. Hood, and that he spent three days in the search of Leslie Brownlee during the first week in January, 1927; that he first went to Battle Axe Inn and talked to Feyerabend to get some idea where this man Brownlee might be, and on the 2nd, which was the same day, his party of six divided—three went west and the others east from Timber Line Cabin to try and discover some tracks, if possible, made by Brownlee coming down the mountain; that he went some little distance east from Mississippi Head and found the Canyons pretty deep and the snow conditions such that he could not travel very fast, so he went across Sand Canyon and over to Little Zigzag Canyon, which was so steep and so deep and the snow so fluffy that he did not attempt to cross it; that Mississippi Head ends in an abrupt cliff two or three hundred feet high and at the foot, Big Zigzag Canyon starts and follows down the highway, and east of that is Little Zigzag Canyon and east of that is Sand Canyon; that some of the locations made on the sketch were not exactly right; that you can almost get a line from the summit of the mountain to Timber Line Cabin and Government Camp, which would be the line a man would follow; that the next day he attempted to make Crater Rock, but some distance above Timber Line Cabin there was quite a blizzard on and he could not see very far and made slow headway and got to some little distance below Triangle Morain and nearly as high as Palmer Glacier, and the wind was so strong and the snow came down so much he could not see about, and that his object was to try and find Brownlee and on account of conditions returned to

Timber Line Cabin; that he did not get to Crater Rock until Wednesday, where hot steam is coming out, and where he hoped to find him; that there is a very steep pitch from the top of the mountain to the fumarole at Crater Rock; that there are always crevasses at all times in any Glacier and were up there, and that during storms they either fill up or bridge over, and that the ice cornices form at the lip of a crevasse or top of a crevasse; that the ice cornice is not deep but is formed by drifting snow and freezing ice, which forms a shelf from either side and meet at the top of a crevasse which may be entirely concealed and under it would be a cavity, and that these crevasses vary in depth; some quite deep and others not so deep that the deepest one he ever measured was eighty-five feet on Reid Glacier, but that the usual average is fifty, sixty and seventy feet; that at one time he was a party of three, two of which went over Palmer Glacier around the edge of White River Canyon up to the top of Triangle Morain, while he went over the lower part of Triangle Morain; that he could not travel near as fast above Timber Line Cabin as he could between Timber Line Cabin and Government Camp, as the higher you go the steeper it is and the snow conditions made it very slow going, because he had to use snowshoes, and the snow was very fluffy; that the snow seemed to be very deep when he was searching the mountain; that there is always snow and ice below Crater Rock and that he was up there the latter part of July, 1927, and found much snow, as there is a Glacier field in there; that there is an abrupt rise from Timber Line Cabin and gets steeper all the way until you get to the summit, and that it would be slower travel, especially on snowshoes, in coming from Crater Rock to Timber Line

Cabin than it would be in going from Timber Line Cabin to Government Camp, and that it would take three or four times as long in going up the mountain.

CROSS-EXAMINATION

Upon cross-examination the witness testified that he did not know why anybody would have crampons on, in snow, as they were used on solid ice, instead of snowshoes; that Palmer Glacier is a secondary Galcier, while Zigzag Glacier is a very large glacier, and Reid Glacier covers a small area, but very deep and very precipitous, and almost impossible to get in Reid Glacier; that during his three day search for Leslie Brownlee, he was pretty well over a good portion of the south side of the mountain above timber line; that a snow crevasse is an opening in the snow, and that he did not remember seeing any crevasses in the ice but that there are crevasses in glaciers all the time, and that the snow fills them up at times, which may form a hard crossing, and might be soft snow not melted, as he had one experience with one covered over with soft snow and fell in, and that he might walk over one with perfect safety and not know it, but that gravity pulls the snow down and causes it to break in fissures and crevasses, and that he remembered seeing some of these places up the steepest part of Crater Rock, but did not see any on Zigzag Glacier; saw some fine crevasses, walls that led down into White River Glacier, or just dropped off like eaves of a house down into space for one or two hundred feet down; that is on the top of Triangle Morain.

REDIRECT EXAMINATION

Upon redirect examination the witness testified that the glacier looked smooth because the snow had drifted and fallen on it and that he could not see any

crevasses if they were there, but that the bridges formed over the crevasses are thin and pretty frail until freezing takes place, and that if you happened to get on a wide crevasse where it had bridged over, you might go through and you might not, and is a dangerous thing to walk over and you cannot always tell where they are at.

RECROSS-EXAMINATION

Upon recross-examination the witness testified that he tried to dig a pocket in the snow and spend the night with others on the mountain but nearly froze and gave it up and returned to Timberline Cabin; that he had no thermometer, but it was cold enough to freeze.

WILLIAM LENZ was called as witness on behalf of plaintiffs and being first duly sworn, testified that he was very familiar with the territory around Mt. Hood and had traveled it practically all his life; that he helped in the search for Leslie Brownlee during the first week of January, 1927, and that until the fifth he searched down in the timber, and then searched from around Crater Rock to the summit of the mountain and found it pretty rough and awfully stormy around Crater Rock; lots of sleet flying and awful cold, and that the snow had blown pretty well off; that he and Mark Weigandt with Lige Coleman, an old guide, oldest he knows of, left Timber Line Cabin and went out towards Mississippi Head, and then took off towards Crater Rock, and he with Mark Weigandt made the summit, while Mr. Coleman had to turn back on account of his heart; that he and Mark Weigandt went around the left hand side of the crater and made the summit and came back on the right hand side to Timber Line Cabin;

that the conditions were so bad that his hand froze through three pair of woolen gloves covered with leather and that the skin peeled off his thumb; that he saw many snow crevasses on the right hand side going up from White River Canyon; these snow crevasses form when a swipe of wind cuts them up; that on the 7th he saw crevasses sixty feet deep, which had been bridged over, some so frail they would not carry anything, and that one day while up there in coming down he became so blind from a blizzard that if he had not known the mountain as well as he did, that he never would have gotten down; that the crevasses on a clear day look like a shadow and at times can see them, while on a stormy day they cannot be seen; some can be walked over without knowing it, while others cannot, as it depends upon the width of the crevasse; that the ice sixty or eighty feet underneath will split and form cracks and fill with drifting snow, and that the day he was up there with Mark Weigandt, they found a hole about the size of a man's head and when hit, the snow fell out five feet in diameter showing a hole thirty feetdeep, and that one held the other while he hit the snow to keep from falling in; that it takes three times as long to go from Timber Line Cabin to Crater Rock as it does from Government Camp to Timber Line Cabin, and naturally would be the same in coming down, as it is steep and hard to get over coming down; that White River Canyon is deep with steep walls and extends down to the timber line and that he searched that side of the mountain; that it is four miles approximately in a direct line from timber line cabin to the top of the mountain, and seventeen hundred feet from Crater Rock to the top of the mountain or practically a quarter of a mile; that it is about a mile and a half from

Crater Rock to Mississippi Head, and that starting one thousand feet from the top of the mountain and going by way of Mississippi Head to Timber Line Cabin would be about one and a half to one and three-quarters miles farther than going in a direct line to Timber Line Cabin, as you would have to travel on an angle or triangular shape; that he was up to Crater Rock during the summer time and found quite a field of snow which extended from Crater Rock down to Reid Glacier, and from there down the snow was pretty well melted; that he put in about two weeks during the summer searching for the body, including the places where the snow had laid and found no trace of it.

Thereupon the following proceedings were had:

Court: I presume it is admitted the body of this boy never was found.

Mr. McCamant: Yes, Your Honor. I want to qualify that admission, simply by the statement that we don't admit he is dead.

Court: But you admit he has never been found?

Mr. McCamant: He has never been found.

CROSS EXAMINATION

Upon cross examination the witness testified that he arrived at Battle Axe Inn on Sunday, and was in and around timber line from Sunday until he made the climb of the mountain; that there was no considerable fall of snow in the country in which he was searching below timber line,—probably eight or nine inches of snow below timber line, but it rained some below timber line; that there was snow higher up on the mountain; that he believes he climbed to the top of the mountain on Sunday, January 7th; that he left

Battle Axe Inn at five-fifteen on the morning of his climb to the top of the mountain and arrived at the summit at three-twenty; that he left the summit at three-forty and arrived back at Battle Axe Inn at nine-fifteen.

REDIRECT EXAMINATION

On redirect examination the witness testified that he left the summit at three-forty and reached Government Camp at nine-fifteen; that he did not time him self from the summit to Crater Rock because he was almost flying,—he was running,—he ran practically all the way; that he judges that he was twenty minutes in getting from the top to Crater Rock.

DONALD BODLEY was called as a witness on behalf of plaintiffs and being first duly sworn, testified that he was familiar with the vicinity and territory around Mt. Hood; that he never reached the summit, but had climbed to Crater Rock; that he helped search for Leslie Brownlee on Mt. Hood during the first week of January, 1927, with Mr. Phillips; that he went practically over the same part that Mr. Phillips went over and that he found the conditions about the same as Mr. Phillips had found them; that on Thursday he started for Mississippi Head and got near to the head of Little Zigzag, and that the weather was a blizzard and he came back.

NO CROSS EXAMINATION

JOSEPH BROWNLEE was called on behalf of plaintiffs and being first duly sworn testified that he was the father of Leslie Brownlee, the insured mentioned in the policy, and was the same beneficiary as mentioned in said policy as attached to the complaint and one of the plaintiffs herein; that the said policy

was offered and admitted in evidence as plaintiffs' Exhibit I, which was admitted as the same policy as alleged in the complaint; that Leslie left for his trip on Mt. Hood on December 31st, 1926, and that he had not seen him since Christmas day prior thereto; that he was a carpenter and that Leslie was an interior decoorator and was of the age of twenty years; that Leslie had never been into any trouble that he had any knowledge about, had no debts and was on very good terms with the family and visited home quite often, or would phone and tell where he was; that at the time he left for his trip on Mt. Hood he lived in some apartment on 14th Street with Al Feyerabend and was unmarried; that Leslie did not live at home at that time nor for eighteen months prior thereto for the reason that it took so much of his time going back and forth; that witness was up at Battle Axe Inn for about two weeks during the search, but was not allowed on the search; that witness was not an experienced mountaineer; that on or about the 20th day of January, 1927, witness called on the defendant and made himself known and spoke to them about the policy, and that he thought it was Mr. Coffey who came along and introduced himself, and looked up the files and said that "We are not liable," and said that the policy expired on January 1st, at noon, and witness asked if there was anything further that could be done in this, and he said "None that I know"; that witness's wife and son were with him at the time, and that he has never heard anything at all of Leslie; that demand was made for the insurance, liability denied.

CROSS EXAMINATION

Upon cross examination the witness testified that he had lived in Portland for eight years and that Leslie had lived in Portland for eight years.

MRS. BARBARA BROWNLEE was called as a witness on behalf of plaintiffs and being first duly sworn, testified that she was one of the plaintiffs in this cause and was the stepmother of Leslie, the insured who was twenty years old when he left; that she was with Mr. Brownlee at the time he went to ask for the payment of Leslie's insurance from the defendant, and that Mr. Coffey looked at a card and said it expired at noon January 1st, and that they did not feel they were liable, and that Mr. Brownlee asked if anything further could be done and he said no; that Leslie lived at home most of the time and had never been in any kind of trouble and liked to visit at home, but had not lived at home for about a year prior to January 1st, 1927; that he was home for Christmas dinner and spoke about making the trip to Mt. Hood; that Leslie owed no debts to any extent that she knew anything about; that she was the same beneficiary as mentioned in the policy and same had never been assigned.

NO CROSS-EXAMINATION

GEORGE CALVERLY was called as a witness on behalf of plaintiffs, and being first duly sworn, testified that he was familiar with Mt. Hood and the conditions up there and had been on the mountain a good deal, but not in the search for Leslie Brownlee; that there are many crevasses around the foot of Crater Rock, and down Zigzag Glacier it is broken up in bad shape; that most of these crevasses bridge over and that some of these bridges will hold up a man and others will not, and are unseen many times; that on the east side of Crater Rock is White River Canyon, very rough and steep, and full of glaciers and snow crevasses, and that this condition prevails down to below

timber line; that there are steep cliffs on White River Canyon, and that the crevasses run from fifteen to two hundred feet; that during a severe storm, you cannot always see these cliffs or canyons, but when the storm is not too dense a sort of black space appears; that in answering a question pointing to the south side of Crater Rock, witness testified that you would find Zigzag Glacier which goes three hundred yards west of Mississippi Head and then strike Reid Glacier, and that the land around the tip of the head is very ragged and that there are crevasses and holes in these glaciers and some of them become bridged over while others remain open during the winter months; that when the snow melts it causes slides and may fill up the canyons several hundred feet and the next year wash out again.

NO CROSS EXAMINATION
PROCEEDINGS ADJOURNED UNTIL TEN O'CLOCK, MARCH 28, 1928.

CHARLES H. GLOS was called as a witness on behalf of plaintiffs, and being first duly sworn, testified that he was a lawyer of more than thirty years practice, and that $750.00 to $1000.00 would be a reasonable attorney's fee to be allowed in this cause, which he affirmed on cross examination.

GEORGE A. HALL was called as a witness on behalf of plaintiffs and being first duly sworn, testified that he was an attorney at law of fifteen years practice in Oregon and that $750.00 to $1000.00 would be a reasonable attorney's fee to be allowed in this cause, which he affirmed on cross examination.

EVERETT PHILPOE was called as a witness on behalf of plaintiffs, and being first duly sworn, testified that he was a photographer by occupation and that plaintiffs' Exhibit II was taken and developed by

himself, which is a photograph taken at about eighty-five hundred feet on Mt. Hood, directly on the road which leads on the south side to the summit and that Crater Rock is south and a little west of this photograph, which was taken in September, 1926, same being offered, and admitted by the court to show the general conditions and contour as they existed there, and for no other purpose; that plaintiffs' Exhibit No. 3 was rejected and no exception; that plaintiffs' Exhibit No. 4 is a photograph taken from a point immediately above Crater Rock looking down from the summit to the right side of Crater Rock, and that he took it himself during the month of April, 1924, and developed it, which was offered and admitted by the court for the same purpose as Exhibit No. 2; that plaintiffs' Exhibit No. 5 is a photograph taken from a point right at Crater Rock and shows the westerly portion of Zigzag Glacier, which was taken by himself about the first of April, 1924, same being offered and admitted in evidence by the court for the same purpose as plaintiffs' Exhibit No. 2.

NO CROSS EXAMINATION

WILLIAM LENZ was recalled as a witness on behalf of plaintiffs and having been duly sworn, testified that the trip to the top of Mt. Hood and back, testified to by him on former cross examination, was made by him on the 7th day of January, 1927, during the search for the boy, and that the weather was bad to Crater Rock, but all right from there down, and was made back in a direct line over a broken trail which existed at that time.

PLAINTIFFS REST.

LA VERNE COLEMAN was called as a witness on behalf of the defendant, and being first duly sworn,

testified that he had climbed Mt. Hood five times since 1926; that he had also climbed Mt. Rainier, Mt. St. Helens, Mt. Jefferson, Three Finger Jack and had been up on Mt. Adams; that in company with Miss Helen Dimmick, Helen Hansen and Basil Clark he attempted to climb Mt. Hood on January 1st, 1927; that they left Government Camp about midnight December 31st; that they did not have snowshoes, but regular hiking boots; that they reached Timber Line Cabin about four o'clock in the morning of January 1st, and left about six o'clock; that at the time they left it was dark but perfectly clear; that there had been moonlight all night; that at the time they left Timber Line Cabin the moon was shining, by which they could see the outline of the mountain; that before daylight he saw lights flashing higher up the mountain; that it became light at eight o'clock; that there was a space of time prior to daylight when he did not see the lights ahead of them on the mountain; that after daybreak he saw two persons about half a mile ahead of them going up the maintain; that a snow flurry came about nine-thirty; that up to that time he had watched the two persons ahead continuously; that these persons were about a quarter of a mile ahead when the storm came up, which became worse, and at eleven o'clock he turned back with his party; that he knew it was eleven o'clock because Mr. Clarke looked at his watch when they turned back and it was eleven o'clock; that about ten-thirty in the morning he was trying to pierce the storm to find the position of Crater Rock and a break came in the storm like pulling a curtain aside and he saw the two persons ahead—one about a hundred feet ahead of the other leaning upon his axe looking up the mountain; the one behind was either kneeling or sitting down facing the mountain;

that they were close enough so that he could see the frame work of their snowshoes; that he drew the attention of the other members of his party to the persons ahead, but the storm closed so quickly that no one else saw them; that they were about a quarter of a mile ahead of his party at the time and were following a course to the left of the course his party was taking ;that his party started back down the mountain at eleven o'clock in the morning; that they followed a compass course, a course south by the compass; that Mr. Clarke had a compass; that they arrived back at Government Camp at three o'clock; that they passed Timber Line Cabin on their way down and stopped long enough to make a cup of tea and then started on; that there were three persons at Timber Line Cabin when they left—two boys and an older man; that when he saw the two persons ahead of them on the mountain through the rift in the storm, they were about a quarter of a mile ahead.

CROSS-EXAMINATION

Upon cross-examination the witness testified that the storm started between nine and nine-thirty A. M., and that at times when a snow flurry came he could not see any distance, but when it slacked down he could see probably half a mile, and that the storm got worse, and that he turned back at eleven o'clock because the members of his party were almost frozen to death; that the storm was very severe at that time; that the storm abated a little about ten thirty, at which time he saw the two persons ahead but did not know who they were, and that he never saw them again, as that was the last time he was able to see any distance, and that they were about a quarter of a mile ahead when last seen.

J. V. RAFFERTY was called as a witness on behalf of defendant, and being first duly sworn, testified that he has resided at Government Camp for four years; that during the year 1927, beginning on the 1st day of January, 1927, he made observations at Government Camp for the Government with respect to the snowfall and temperature at Government Camp, and that he made a record of the same, which covered January, February, March and April, 1927; that this point of observation is the nearest point to the summit where observations are taken for government purposes; that a tabulation in lieu of the permanent records, marked defendant's Exhibit "A," was received in evidence.

CROSS-EXAMINATION

Upon cross-examination the witness testified that said observations were made at Government Camp only which is about four thousand feet in elevation and that Mt. Hood is eleven thousand one hundred twenty-three feet.

DEFENDANT RESTS

WHEREUPON the jury was excused, and thereafter the defendant moved the court for a directed verdict in its favor and against the plaintiffs upon the following grounds, to-wit:

1. That there was a total failure of proof of death from accidental causes.

2. That there was a total failure of proof of death from accidental causes prior to the time the policy issued by the defendant expired.

3. That there was a total failure of proof of any death, affected directly and independently of all other causes, through accidental means.

4. That there was a total failure of proof of death effected directly and independently of all other causes through accidental means prior to the expiration of the policy issued by the defendant.

5. That there was a total failure of proof of death caused in any manner covered by the provisions of the policy of insurance issued by the defendant.

6. That there was a total failure of proof of death resulting from bodily injuries received prior to the expiration of the policy of insurance issued by defendant.

WHEREUPON argument was heard on said motion by counsel for the respective parties herein by the court, and thereafter the following proceedings were had:

OPINION OF THE COURT

COURT: The case that you have cited in 20 Pacific is where a person was absent from the state for a period of seven years, and there was certain evidence introduced at the trial showing that he was a man of certain habits, and that he was seen going to a certain place at a certain time; was a member of the Elks, Odd Fellows, Masons, in good standing, had no financial reason for leaving, etc. The court held that raised the presumption of death; but the long lapse of time that passed after he was missed was the strongest factor in support of the presumption, but the court there did not hold that he died at any particular time, or at any particular place; to have done so would have put the court in the position of basing a presumption on a presumption.

Now the case that you have cited in 141 Federal, San Rafael & Sauslito vs. Hale,—in that case there was some positive evidence, or evidence, to the effect that the party had crossed the ferry for the purpose of

taking a trip upon this boat, and that he was seen at an eating house, and there were a great many other circumstances from which the court could infer that he had been a passenger upon the boat at the time the boat went down. It is very obvious that this case would not be considered an authority here.

The case you have cited in 100 Federal, 582, Standard Life & Accident Co. vs. Thornton, is a case where the court directed a verdict. It was a case where a party had a life insurance, and there was a clause in the policy to the effect that it would not be valid in case the party committed suicide, and the court held that it was incumbent upon the defendant to establish that fact. That was not a case where it was incumbent upon the plaintiff to establish the fact, but that had to be established on behalf of the defendant. That was a matter of defense, consequently that case should have gone to the jury.

Now I want to call your attention to a case that was recently decided by the Supreme Court of the United States, decided by Justice Holmes on March 12, 1928, case of the Kansas City Southern Railroad vs. Franklin D. Jones: "This is an action under the Employers' Liability Act for the death of one R. D. Ferguson, who was a car inspector on the Petitioner's road. No one saw the death, but the body was found between the main track and a parallel track, and the probability is that Ferguson was killed by a train going north on the former. A freight train was being made up on the parallel track, and the hypothesis of the respondent, supported by little if anything except the place where the body and the lantern of the deceased were found, is that Ferguson was engaged in inspecting the cars and so absorbed in his work that he did not hear the approaching train, but was relying

upon the ringing of the engine bell, which usually was rung, but which the respondent's witnesses say was not rung on this occasion. The court below sustained the verdict on this ground. Ferguson was seen not later than a quarter before seven in the evening, so far as time can be fixed. The train passed at five minutes after seven, the time at which it was known by him to be due. His body was found at twenty-five minutes after seven. He was an experienced man. The indications are that there was nothing for him to inspect at the probable time of his death. At best it is a mere guess that he was so engaged, still more that he was absorbed in such work. The main track was straight, and the train was making a great noise, and showing a bright light as it approached. Nothing except imagination and sympathy warranted a finding that the death was due to the negligence of the petitioner, rather than to that of the man himself."

Now these cases that you have cited, where a presumption of death has been raised, depend upon the fact of a long lapse of time; it is not the circumstances themeselves alone, the mere fact that a man belonged to the Odd Fellows, The Masons, and the Elks, in good standing; those circumstances would not be sufficient to raise a presumption of death, but it would be supported by his absence for a long period of time. That long period of time is the most prominent factor in raising that presumption.

Now in this case we may assume that these boys separated at eleven o'clock, and that the weather was all that your witnesses claim, and that the conditions were exactly as they have described them. What is there in the case whereby we can say, or whereby there is a presumption that death occurred at twelve o'clock, or five minutes before twelve, or five minutes after

twelve, or at one o'clock, or at two o'clock, and what is there in the case whereby a presumption can be raised that he died at any particular place upon the side of that mountain? Now that matter, I think, would be left to the guess of the jury. The evidence in this case might be sufficient to raise a presumption that the death of deceased was caused by reason of the conditions as they existed at Mt. Hood, January 1, 1927, coupled with the fact that a diligent search has been made for him, and that he has never been found, and the length of time that has transpired since January 1st. All these facts taken together might at this time raise a presumption that death had occurred, but that is as far as it will go. To say that that presumption would give rise to another presumption that he died at a particular time, or particular place, cannot be supported by the authorities. The Supreme Court of this state has decided a number of cases very similar to this, and where the question for consideration was the cause of death, and has held that where that mater is left to the speculation, or to the guess of the jury, a verdict should be instructed. I will instruct the jury to bring in a verdict accordingly.

Mr. Cole: We wish to reserve an exception for the record, No. 2.

Thereafter the Jury returns a verdict in favor of the defendant at the direction of the court.

Mr. McCamant: We would ask to have judgment entered upon the verdict.

Mr. Cole: And we save an exception, No. 3.

WHEREUPON the court now being willing to preserve the record in order that its rulings and each of them may be reviewed for error, if any, thereupon certifies that the foregoing bill of exceptions contains all the evidence offered to which exceptions are here-

in taken, and all admitted on the trial in substance form, together with the rulings of the court, and the following exhibits: Plaintiffs' Exhibits 1, 2, 4, and 5, and defendant's Exhibit "A," together with stipulation entered into between counsel for plaintiffs and defendant, and opinion of the court on the defendant's motion for a directed verdict, and that said bill of exceptions conforms to the facts.

WHEREFORE, this bill of exceptions is now here settled, certified, approved and signed this 18th day of April, 1928, and the same is hereby directed to be filed.

JOHN H. McNARY,
Judge.

State of Oregon,
County of Multnomah,—ss.

DUE SERVICE of the within Bill of Exceptions is hereby accepted in Multnomah County, Oregon, this 13th day of April, 1928, by receiving a copy thereof, duly certified to as such by Ernest Cole, attorney for plaintiffs.

McCAMANT & THOMPSON,
Attorneys for Defendant.

Filed April 18th, 1928—G. H. MARSH, Clerk.

AND AFTERWARDS, to-wit, on the 18th day of April, 1928, there was duly filed in said court a praecipe for transcript of record in words and figures as follows, to-wit:

(Title of Court and Cause)

PRAECIPE FOR TRANSCRIPT OF RECORD

To GEORGE H. MARSH, Clerk of the above entitled Court:

You will please prepare transcript of record for appeal in the above entitled action, including in said transcript the following documents: Complaint, An-

swer, Reply, Notice of Appeal, Amended Assignments of Errors, Citation, Undertaking on Appeal, Record of Trial, ~~Verdict~~, Judgment and Bill of Exceptions, and Praecipe for Transcript of Record.

ERNEST COLE,
Attorney for Plaintiffs.

Filed April 18th, 1928—G. H. MARSH, Clerk.

United States

Circuit Court of Appeals

For the Ninth Circuit.

JOSEPH BROWNLEE and
BARBARA BROWNLEE,
Appellants,

vs.

MUTUAL BENEFIT HEALTH and
ACCIDENT ASSOCIATION,
Appellee.

Appellants Brief

Upon Appeal from the United States District Court
of the District of Oregon.

ERNEST COLE, *Attorney for Appellants,*
Portland, Oregon

McCAMANT and THOMPSON, *Attorneys for Appellee,*
Portland, Oregon

WILLAMETTE PRINTING CO.

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STATEMENT OF FACTS

On the evening of December 31st, 1926, at the hour of 10:00 P. M., Al Feyerabend and Leslie J. Brownlee left Battle Axe Inn at Government Camp, located at the base of Mt. Hood, in Hood River County, Oregon, on the climb up Mt. Hood, with the sole and only purpose of being the first to reach the top of Mt. Hood on January 1st, 1927, both of which had made the trip before. That they reached what is known as Timber Line Cabin at about 1:00 A. M. and left that place for the upward climb at about 2:30 A. M., early in the morning of January 1st, 1927. That Battle Axe Inn is about 4000 feet; Timber Line Cabin 6000 feet; and Mt. Hood 11,225 feet in elevation; that Battle Axe Inn is about four miles from and below Timber Line Cabin, and that Timber Line Cabin is about four miles from and below the summit of Mt. Hood; that in the ascent, they selected a course between two dangerous sections of the mountain, known as Palmer Glacier on the right and Zigzag Glacier on the left, both of which are lined with and contain crevasses, and between which is the usual route taken by climbers from the south side of the mountain; that their footwear consisted of both crampons and snowshoes, and that Leslie Brownlee had what is known as "Beavertail" snowshoes, the only pair of its kind known of around Mt. Hood; that they were both warmly dressed for the climb and carried enough food to last for the return; that shortly after leaving Timber Line Cabin, they encountered a snow storm, and as they got higher on the mountain, it became worse, in fact become so bad that they were unable to see or recognize anything, except the edge of White River Canyon, which beyond was a deep blue, and up the edge of which they con-

tinued, keeping far enough away so as not to fall into it. That as they climbed, the storm become worse and Leslie Brownlee, becoming tired, decided to turn back, which he did after taking Feyerabend's compass; that Feyerabend continued to climb up the mountain, and after what seemed to him to have been a long time, which might have been an hour, more or less, after Brownlee had turned back, he, Feyerabend become discouraged because of not being able to see anything on account of the storm and not feeling safe, also turned back, at which place Feyerabend thought was 10,000 feet in elevation and in the immediate vicinity of Crater Rock, which is about one-fourth mile from and below the summit of Mt. Hood. That Feyerabend in his descent of the mountain, by reason of the storm, become confused and lost his bearings and location, and traveled about one and one-fourth miles out of his way from the course taken upwards, and after considerable difficulty, located himself above and in a direct line from what is known as Mississippi Head, which is above and to the west of Timber Line Cabin. That he proceeded from there to Timber Line Cabin, where upon his arrival he stopped to inquire of an old man there, about Leslie, and left said place at about 2:45 in the afternoon of January 1st, 1927, for Battle Axe Inn, where he arrived about 4:30 in the afternoon of said date. That the weather continued about the same while descending the mountain until he reached an altitude of about 7000 feet, at which place he thought it cleared up some; that, he, Feyerabend had forgotten and could not remember the time and place on the mountain where Leslie Brownlee turned back and which was the last he ever seen of him, but could remember the time of 11:30 A. M., but

could not place the location or event, and if he was not mistaken, they had planned to reach the summit of Mt. Hood between 11:00 A. M. and Noon on January 1st, 1927; that he made an account of the trip upon his arrival back at Battle Axe Inn to Mr. Sickler, which statement was correct, but the court refused to allow Mr. Sickler to testify as to what Feyerabend stated was the time and place where he left Leslie Brownlee and the manner in which he arrived at that time, for the reason that same was immaterial and hearsay; that the mountain in, around and below Crater Rock is lined and full of crevasses, which either fill up or bridge over in the winter time and cannot be seen through which a man may fall, and which crevasses average around fifty, sixty and seventy feet in depth and are dangerous. That there are canyons on the mountain near the vicinity where these boys separated with steep and precipitous sides and high cliffs, and that a person, unless kept moving, would have soon frozen; that the storm was very severe through which nothing could be seen; that these boys left their street clothes at Battle Axe Inn, and that Leslie Brownlee has never been seen or hard of since he was last seen by Feyerabend on Mt. Hood on January 1st, 1927, but would have been seen if he had returned by way of Battle Axe Inn; that a thorough search of the mountain was made for him at the time and during the first week of January, 1927, and also during the summer of 1927, after much of the snow had left the lower parts of the mountain, and no trace of any kind has ever been found of Leslie Brownlee at any time; that it takes much longer time to travel from Crater Rock to Timber Line Cabin coming down the mountain, than it does in coming down from Timber Line Cabin to

Battle Axe Inn, at Government Camp; Feyerabend testified that on the upward climb he seen four persons, which he thought was about two hours below and behind them, and two witnesses of a party of four also testified that they attempted to climb Mt. Hood on Jan. 1st, 1927, and seen two persons ahead of them up the mountain, and that these two persons were about one-fourth mile up the mountain ahead when last seen at about 10:30 in the morning of said date, and that the storm was described as something terrible, and that they were compelled to turn back at eleven in the morning of Jan. 1st 1927, by reason of the storm, as they were nearly frozen to death, and at the time they turned back, were between one-fourth and three-fourths miles from and below Crater Rock and had not overtaken the two persons seen ahead. That Leslie Brownlee carried an accident insurance policy with the defendant and appellee herein, which expired at noon on January 1st, 1927, and as stipulated, (T. of R., p. 53); that the court upon hearing this cause instructed the jury to return a verdict in favor of the appellee herein, upon the grounds that no proof had been offered from which a jury could infer the time, place and manner of Brownlee's death, if dead, basing his presumption upon the fact that Leslie Brownlee was last seen on Mt. Hood at Eleven o'Clock on the morning of January First, 1927, under the conditions as described in the evidence, and as set forth in the Transcript of Record herein, and entered a judgment on said verdict in favor of the appellee herein, from which rulings this appeal is prosecuted upon the following assignment of errors, to-wit:

ASSIGNMENT OF ERRORS

I.

That during the trial of said cause the court erred in refusing to allow the witness E. J. Sickler to testify as to what the witness Al Feyerabend stated to him as to the time and place he last seen and left the insured Leslie Brownlee on Mt. Hood, upon his arrival at Battle Axe Inn on Jan. 1st, 1927, at the hour of 4:30 P. M., (which the appellants offered to prove by the said witness Sickler, that Feyerabend stated he left Leslie Brownlee at the hour of Eleven o'Clock, and that Leslie looked at his watch at the time he left him, and said to him that it was Eleven o'Clock; and that it was in the vicinity of Crater Rock, just below (T. of R., page 47).

II.

That the court erred in directing a verdict for the defendant and appellee herein.

III.

That the court erred in entering a judgment for the defendant herein.

IV.

That the verdict and judgment entered herein in favor of the defendant and appellee herein are contrary to law.

ARGUMENT AND AUTHORITIES RELIED UPON

I.

The great weight of authority holds that the trial court erred in refusing to allow the witness Sickler to testify as to the time and place where Feyerabend stated he left Brownlee on Mt. Hood upon his arrival at Battle Axe Inn on the afternoon of Jan. 1st, 1927,

after Feyerabend had testified that he had forgotten, but that he made a statement to the witness Sickler of the trip which was correct (T. of R., pages 40 and 41).

> Where a witness testifies that he has truly stated to a third person, from his own knowledge, a fact which he has since forgotten, he thereby renders competent the testimony of that person as to what the forgotten statement actually was.
>
> Vol. 22 C. J., page 217 paragraph 181.
>
> Shear vs. Van Dyke, 10 Hun. (N. Y.) 528.
>
> Hart vs. Atlantic Coast Line R. Co., 144 N. C. 91-92, 56 S. E. 559.
>
> Mares vs. State, 158 S. W. 1130 (Tex.).

Feyerabend stated (T. of R., page 40) that he could not remember the time and place Brownlee turned back on the trip up Mt. Hood, which was the last time he ever seen him, but testified that he made an account of the trip to Mr. Sickler after he returned to Battle Axe Inn, which statement was correct (T. of R., p. 41).

The appellants offered to prove by the witness Sickler the time and place which Brownlee was last seen by Feyerabend on the trip up Mt. Hood, which was at Eleven o'Clock in the forenoon of Jan. 1st, 1927, and that he left him just below Crater Rock, but the trial court upon objection of the defendant refused to admit said offered evidence, upon the grounds that same was irrelevant, immaterial and is hearsay. (See T. of R., pages 46 and 47.

We think the court should have admitted said evidence and that the court erred in not doing so, as it compelled the appellants to prove said time and place by circumstantial evidence alone.

II.

The sole question involved herein as to the assign-

ment of errors number II, III and IV, is that the court erred in instructing the jury to return a verdict for the defendant or appellee herein and entering a judgment thereon, and that this cause should have been submitted to the jury for their consideration.

We think the evidence offered by the appellants as to the time and place where Brownlee was last seen by Feyerabend on the said trip up Mt. Hood, was sufficient from which the jury could have inferred that the time was prior to noon of Jan. 1st, 1927, and that the place was in the vicinity of Crater Rock, which is about one-fourth mile below the summit of Mt. Hood.

The witness William Lenz, testified on cross examination, (T. of R., page 60) that it took him five hours and thirty-five minutes to make the trip from the summit of Mt. Hood to Battle Axe Inn, on Jan. 7th, 1927, and on further examination on behalf of appellants, (T. of R., p. 64) testified that he come down in a direct line over a broken trail, which was an average for the eight miles, of one mile in 42 minutes, and it was testified, that the way Feyerabend said he come back, would have been at least one and one-fourth miles further (T. of R., pages 51 and 59) than in a direct line, starting at Crater Rock, and as it was testified that it is about one-fourth mile from the summit to Crater Rock (T. of R., p. 58) we would have Feyerabend traveling at least one mile further, or about nine miles, which at the rate the witness Lenz traveled, would have taken him six hours and 18 minutes to have reached or got back to Battle Axe Inn, from where he turned back (T. of R., p. 44), on the mountain, and where he testified that he arrived at about 4:30 in the afternoon of Jan. 1st, 1927. These parties

may have not traveled at the same rate of speed, but it is certainly evidence for the jury, as it was testimony given on cross examination, and the witness Lenz had better weather and trail to travel over than Feyerabend had on his return trip.

Again we have the testimony of experts that it takes much longer in coming down Mt. Hood to travel between Crater Rock and Timber Line Cabin than it does between Timber Line Cabin and Battle Axe Inn (T. of R. pp. 51 and 55), and one witness, Lenz, stated three times as long (T. of R., p. 58), and Feyerabend stated that he arrived at Timber Line Cabin at about 2:45 in the afternoon of Jan. 1st, 1927, and that it took him about one hour and forty-five minutes to travel on this occasion between Timber Line Cabin and Battle Axe Inn (T. of R., p. 41).

We also have a party of four who turned back at Eleven o'Clock in the forenoon of Jan. 1st, 1927, while attempting to climb Mt. Hood, (T. of R., pp. 48 and 65) on account of the terrible storm as it was described, and who seen two persons ahead, and when last seen at about 10:30 A. M., were about one quarter of a mile ahead up the mountain, and that this party of four were somewhere between one quarter and three-quarters of a mile below Crater Rock at the time they turned back, (T. of R., p. 48) making the fact to be that if these two persons seen ahead were Feyerabend and Brownlee, which no doubt they were, Feyerabend and Brownlee was at that time in the immediate vicinity of Crater Rock at Eleven o'Clock A. M. of Jan. 1st, 1927, and it is a fact from the evidence that Feyerabend and Brownlee left Timber Line Cabin for the upward climb before this party of four left, see (T. of R., pages 42 and 49), and were ahead of this party of

four at some place on the mountain, all of which were facts from which the jury could fix the time and place Feyerabend left Brownlee. We must also take into consideration that Feyerabend traveled up the mountain for some time, after Brownlee turned back, we cannot tell how long as he does not know, before he turned back.

We now come to that place where the trial court says that there was no evidence from which the jury could infer that Brownlee is dead, and if dead, the time and manner of his death.

> Death by suicide will not be presumed from the fact that a person last seen about 10:00 o'Clock at night on board a steamer in mid-ocean. The presumption is in favor of his having fallen overboard, either by accident or by some external force applied to him, and the death is within the risks assumed by an accident policy insuring against death from bodily injury effected through external, violent and accidental means.
>
> Travelers Ins. Co. vs. Mary Rosch, 13-23 Ohio Circuit Courts Consolidated 491; aff., 70 N. E. 1133; 69 Ohio State Reports 561.

The above case involved an action on an accident insurance policy where a man was last seen in mid-ocean on a steamer, which reached its destination and did not encounter a storm, and the court on page 493 and 494 thereof, says:

> "It is possible that Rosch is living, as it is possible that if one sets in this court room and fires a pistol at another, and that other be found immediately thereafter dead with a bullet in his body, that he died of heart failure just before the bullet struck him; but everybody would find and every jury and every sensible man in the world would find in the case last stated that the man died from the bullet wound. And it seems as though we could not doubt that every sensible man with

these facts before him would find this man dead.

It is said, on the part of the plaintiff in error, that it is but an inference that he is dead. It is an inference, such an inference as carries absolute conviction to every thinking man.

Now it is said that to hold he died by external violence is an inference upon an inference, which ought not to be allowed; but the jury found, as they necessarily must have found, that this man was dead. And if the question had been directly put to them, DID HE DIE BY DROWNING, it can hardly be doubted that they would have answered in the affirmative, and if he died by drowning he died by that external violence which is insured against in this policy, unless it was a case of suicide."

We contend that under the pleadings in the present case, that the jury could have decided this case, with an answer to the following question:

Did Brownlee, prior to noon of Jan. 1st, 1927, fall into a crevasse on Mt. Hood, as a result and by reason of the exposure to the stormy and freezing conditions existing thereon, the effects from which he died at that time or at any time prior to Jan. 20th, 1927?

It was not necessary for Brownlee to have met his death prior to noon of Jan. 1st, 1927, under the policy; it was only necessary that he meet with some accident prior to that time, the effects from which caused his death at any time prior to Jan. 20th, 1927, under the pleadings and policy, although if he fell into a crevasse, which no doubt he did, his death was probably instantaneous. The policy in this cause states accidental means only and does not require external and violent means.

This boy when last seen, was in a storm so severe that nothing could be seen in front of him (T. of R., pp. 35 and 37), and there are many deep crevasses

and holes in the vicinity and below Crater Rock (T. of R., pp. 50, 55 and 58) which either fill up or bridge over in the winter time and cannot be seen.

We contend that this boy when last seen was not only coming in contact with a specific peril but was already in a position and surrounded by an imminent peril from which a continuation of life would be inconsistent from a disappearance thereon, and that the jury had a right to infer that he met with a fatal accident immediately after he was last seen by Feyerabend, and that this case should have been submitted to the jury for their decision.

In the case of FIDELITY MUTUAL LIFE ASS'N vs. METLER, 185 U. S. 308, the court on page 316 thereof, speaking of the foot prints and flowing river, says:

> "Indicated what might have happened, and the fact he did not return etc., rendered the inference of FATAL ACCIDENT REASONABLE."

which case involved a life insurance policy, but the principle as laid down therein and from the decision of the court as given, we think makes that case appliable here, as if there was grounds for the inference of a FATAL ACCIDENT, it would also have been submitted to the jury in case the action had been brought upon an accident insurance policy, as the facts therein covered an accident.

The insured, Hunter was thought or supposed to have drowned in the Pecos river, but no one seen him, and neither was he ever seen or heard of afterwards, although there was some evidence offered that he was afterwards seen alive, and the court again on page 319 thereof, says:

> "There was no evidence that Hunter was in a position of peril when last seen. The evidence did, indeed, tend to show that he probably fell into the river, and so came in contact with a specific peril, and there was evidence regarding the depth, etc., of the river."

which decision affirmed the lower court and was written by C. J. Fuller.

Leslie Brownlee was surrounded with crevasses and cliffs, which could not be seen in the storm, and to stand still meant freezing to death, (T. of R., p. 41), and it appears to us that the present case is much stronger than the case last above cited.

In the case of CONTINENTAL LIFE INS. CO. vs. Searing, 240 Fed. 653, and on page 657 thereof, the court, speaking of Searing going in bathing and not having been seen again, says:

> "In view of this proof, was the court bound to withdraw the case from the jury and to hold as a matter of law, that no inference could be drawn from these proofs that the insured was dead."

and again on the same page thereof, the court, speaking of no presumption of death until after the lapse of seven years, says:

> "This presumption of life can be met and overcome by proof of circumstances of specific peril to which the person disappearing was subjected, and we think there was evidence in this case which, if believed, tended to show such peril."

and in the same case on the same page thereof, the court says:

"That each case of disappearance has its own individual facts", and it is true that the last case above cited was reversed and a new trial ordered, but only upon errors in the admission of evidence, which does not effect the principle upon which the court dwells as to an inference from coming in contact with a spe-

cific peril or placed in a position of imminent peril, and while it also involved a life insurance policy, we think it also comes within the principle of an accident insurance policy for the reason that all authorities hold drowning is an accident, and upon that ground would be in the same class with the case of Travelers Ins. Co. vs. Rosch, Supra, and under which also comes the case of Lancaster et al vs. Wash. Life Ins. Co., 62 Mo. 121, of which the Syllabus reads as follows, to-wit:

> In a suit on a life insurance policy, it appeared that the assured who was an unmarried man of about forty years of age, took passage on a lake steamer bound for Buffalo; that on the voyage he seemed to be sick and despondent; that while the vessel was in Lake Huron, he was seen in the evening on the guard, and leaning out through a "shutter" in the bulwark of the boat, which opened upon the water; that on landing at Buffalo, ineffectual search was made for him, but in his stateroom were found his coat, hat and valise; that the vessel stopped at way points, but he was not seen to go ashore, and could not have landed unobserved; Held, that the testimony was amply sufficient to show that he was brought in contact with a SPECIFIC PERIL, and to raise a presumption that his death was the result of ACCIDENT.

AND taking the case of THE SAN RAFAEL R. R. CO., ET AL vs. HALE ET AL, 141 Fed. 270, which the trial court says is not an authority here, while it is a fact that the boat went down which Hale was supposed to have been upon, nevertheless counsel for the appellant in that case claimed that it was a presumption on a presumption for the court to infer that Hale was on the boat, and then infer that he went down with it, as there was no direct testimony or evidence that Hale was on the boat, and none to show that if he was on the boat, that he went down with it and

perished or drowned, and on page 279 thereof, the court says:

> "To do so is not, as contended by the Proctor for the appellant, basing presumption upon presumption, but it is the drawing of the proper and logical inference from all the facts and circumstances disclosed by the evidence in the case",

and is it not a fact that in the present case, we have a better foundation from which the proper and logical inference may be drawn that Brownlee met with a fatal accident, then existed in the last case cited above, for the reason that we know that Brownlee when last seen was on Mt. Hood in a severe storm, where there exists many crevasses which might bring death at any moment and which could not be seen in the storm; exposed to weather which would soon freeze a man to death if he did not keep moving, and all the authorities hold that freezing to death is also an accidental death, as it is said in the case of THE N. W. COM. TRAVELERS ASS'N vs. LONDON GUARANTEE & ACCDT CO., 10 MAN. 537 (1895),

> "The assured was frozen to death on the prairie near fort MacLeod to which place he was returning from one of his trips in company with the driver. While still about eight miles out, the wagon broke down. The weather had turned suddenly very cold and stormy, and the assured being to cold and numb to walk, and unable to ride, it was agreed that he should remain where he was while the driver rode to MacLeod for assistance, but he died before the driver returned. The assured was sufficiently warmly clothed for the weather as it was when he set out, but not for the storm which he encountered; HELD, that he met his death as the result of an injury effected through external, violence and accidental means, within the meaning of the policy, and that it could

> not be said that he exposed himself to any obvious or unnecessary danger; and that the plaintiffs were entitled to recover."

and also see the case of Brady vs. Oregon Lumber co., 117 Oreg. 189, which holds that freezing is an accidental injury.

The next question is upon what authority would the jury be warranted or justified in fixing the time from the evidence that Brownlee met with a fatal accident prior to noon Jan. 1st, 1927.

We find that the great weight of authority is to the effect and holds that where a person was last seen in a state of imminent peril that might probably result in his death, and is never seen or heard from again, though diligent search has been made, that the inference of immediate death may justly be drawn, as in the case of THE N. W. MUTUAL LIFE INS. CO. vs. Stevens et al, 71 Fed. 258, and on page 261 thereof, the court says:

> "It is conceded that when one who is last seen, is in a state of imminent peril that might probably result in his death, is never again heard from, though diligent search for him is made, the inference of IMMEDIATE DEATH may justly be drawn",

which is supported by the following authorities, to-wit:

> Carpenter vs. Sup. Council Legion of Honor, 79 Mo. App. 597.
> Tisdale vs. Ins. Co., 26 Iowa 170.
> Lancaster et al vs. Wash. Life Ins. Co., 62 Mo. 121.

and in the case of N. W. Mutual Life Ins. Co., vs. Stevens et al Supra, the court, also on the same page 261 thereof, says:

> "That two cases of disappearance in which the facts are exactly alike will probably never arise

and the strength of the presumption of life or death will never be the same in any two cases".

It was impossible for us to produce a case to the trial court wherein the facts are exactly the same as in the present case, and we must rely more or less upon logical reasoning from cases of these kind which have gone before, and in which the principle and reasoning is based upon the same foundation.

These cases of explained disappearance as we understand the law, are cases within and unto themselves based upon logical reasoning founded upon the experience and knowledge as living beings coming in contact with the forces of nature and the desires, wishes and the weakness of man.

It is said in Vol. 17 C. J. page 1169:

> "The presumption of death from seven years absence DOES NOT PRECLUDE AN INFERENCE THAT DEATH MAY HAVE OCCURED BEFORE THE EXPIRATION OF SUCH PERIOD, WHERE THERE ARE CIRCUMSTANCES WHICH WOULD JUSTIFY A CONVICTION THAT DEATH OCCURRED AT AN EARLIER DATE, as for instance that the absent person, during the period after his disappearance encountered some SPECIFIC PERIL, or was subject to some immediate danger calculated to destroy life, or where the circumstances are such as to make it improbable that he would have abandoned his home and family;"

and many authorities cited therein.

And as the court well said in the case of LANCASTER ET AL, vs. WASH. LIFE INS. CO., Supra. on page 128 thereof, speaking of the seven year presumption:

> "That when last heard from he was in contact with some specific peril likely to produce death,

> or that he disappeared under circumstances inconsistent with a continuation of life. When considered with reference to those influences and matters which ordinarily control and direct the conduct of rational beings; in either of which cases the jury are at liberty to infer that death occured at such time within seven years as from the TESTIMONY MAY SEEM MOST PROBABLE":

Defendant of course will contend that he might have died from other causes not accidental; it was so contended in the cases heretofore cited herein, but what would a reasonable sensible man say become of Leslie Brownlee. Can it be said that the trial court was more competent than a jury of twelve competent men to pass upon the question as to whether the evidence herein carried a conviction of what become of Leslie Brownlee, and that as a question of law no inference could be had therefrom?

It was said by the court in the case of STANDARD LIFE & ACCIDENT INS. CO. vs. THORNTON, 100 Fed. 582-40 C. C. A. 564, that:

> "A case can properly be withdrawn from the jury, only when, on a survey of the whole evidence and giving effect to every inference fairly or reasonably to be drawn from it, the case is palpably for the party asking a preemptory instruction";

Brownlee was more or less experienced in mountain climbing and had been on Mt. Hood before. If nothing fatal had of happened to him within a very short time after he was last seen, he no doubt would have reached safety and would have passed the Glacier fields, or else his body would have been found when the snow left the lower levels. No other conclusion can be reached, other than he fell into a crevasse and was covered over with snow and ice in the glacier fields on Mt. Hood and never will be found.

Now if an inference could be had, such as was held could be had in the cases of The TRAVELERS INS. CO., vs. ROSCH, SUPRA: FIDELITY MUTUAL LIFE INS. vs. METLER SUPRA: LANCASTER vs. WASH. LIFE INS. CO., SUPRA; SAN RAFAEL R. CO. vs. HALE et al, Supra; and N. W. MUTUAL LIFE INS. CO., vs. STEVENS et al Supra; is it not reasonable that such an inference could also be had by the jury in the present case from the evidence given in this case and as shown by the T. of R. herein?

Brownlee was certainly in a perilous position when last seen. He could not stand or remain in one place long without freezing to death, and he was surrounded with crevasses and cliffs in a storm which prevented him from seeing them, and no doubt many were lightly bridged over and could not have been seen in any kind of weather; and in which he could easily have met his death.

COUNSEL for defendant and appellee herein in the trial court relied a great deal upon the case of Insurance Co. vs. McConkey, 127 U. S. 661, but we fail to see where that case has anything in point with the present case, for the reason that the policy in that case is entirely different from the policy involved in the prsent case, as on page 666 thereof, the court says:

> "The policy provides that the insurance shall not extend to any case of death or personal injury, unless the claimant under the policy establishes by DIRECT AND POSITIVE PROOF that such death or personal injury was caused by external, violent and accidental means."

which case was reversed only upon an instruction given to the jury by the trial court and remanded back for a new trial, which the court on page 667 thereof, says;

> "We, are however of the opinion that the instructions to the jury were radically wrong in one particular. The policy expressly provides that no claim shall be made under it where death of the insured was caused by "INTENTIONAL INJURIES INFLICTED BY THE INSURED, OR ANY OTHER PERSON." If he was murdered, then his death was caused by INTENTIONAL INJURIES INFLICTED BY ANOTHER PERSON. NEVERTHELESS, the instructions to the jury were so worded as to convey the idea that if insured was murdered, the plaintiff was entitled to recover."

The policy involved in the case last above cited provided for DIRECT AND POSITIVE PROOF and besides also provided that no recovery could be had if the insured was either shot by some one intentional or by himself. That case is no where in point in the present case.

Defendant also cited the case of Keefer vs. Pac. Mutual Life Ins. Co., 20 Pa. 448, 51 Atl. 366, as being in point in the present case, which held that an inference cannot be founded upon an inference, which case is not in point herein for the reason that nothing was shown that the insured was in a position of peril when last seen alive or that he come in contact with a specific peril, or might have come in contact with a specific peril and it was not a disappearance case; the case was based upon entirely different facts under different conditions than the present case. It appears that the trial court based its decision in its opinion herein upon the case of KANSAS CITY SOUTHERN R. R. vs. Franklin D. Jones decided by Justice Holmes on March 12, 1928. We have examined this case carefully and fail to see where it applies here. The question involved in that case was whether the deceased

was negligent or the defendant, and as there was no evidence to show that the defendant was negligent, no action could be maintained, as it was necessary, as I understand the case, to show that the defendant R. R. Co., was negligent. There is no question of negligence involved in the present case. If negligence is involved in the present case, and the case last above cited and relied upon by the trial court applies in the present case, then the cases of The Travelers Ins. Co., vs. Rosch Supra, and the case of Fidelity Mutual Life Ins. vs. Metler, 185 U. S. 308, Supra, are wrong and should have been reversed, and that the case cited and relied upon by the trial court would also have applied in the two last above named cases, and in all the other cases cited and relied upon in this brief by the Appellants herein, and you might as well say that in case of sickness and death under a life insurance policy, the question could be raised; Was the insured negligent in getting sick, and then was he negligent after he become sick, in not employing competent medical services, or would it be necessary to show that he was free from negligence?

AND in conclusion, we Respectfully submit to this Hon. Court that the trial court erred in the trial of this cause upon all and each of the assignment of errors assigned herein, and that this cause should have been submitted to the jury for their consideration, and that the judgment entered herein is erroneous and and should be reversed.

Respectfully submitted,

ERNEST COLE,

Attorney for Appellants.

No. 5481

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JOSEPH BROWNLEE AND BARBARA BROWNLEE,
Appellants,

vs.

MUTUAL BENEFIT HEALTH AND ACCIDENT ASSOCIATION,
Appellee.

Appellee's Brief

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J. R. ROGERS, PRINTER

INDEX

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STATEMENT OF FACTS

This is an action brought by the father and stepmother of Leslie J. Brownlee on an accident insurance policy written by appellee which expired at noon on the 1st of January, 1927. The policy is attached to the complaint as Exhibit "A" and is found in the record at pages 7 to 18. The salient allegation

contained in the complaint is found in paragraph IV thereof on page 4 of the record and is as follows:

> "That on the first day of January, 1927, and prior to 12 o'clock noon of said date and while said policy was in full force and effect, and while the said insured, Leslie J. Brownlee, was on an outing and pleasure trip on Mount Hood, situated in the County of Hood River, State of Oregon, the said Leslie J. Brownlee received and sustained bodily injuries effected through external, violent and accidental means, which said means alone caused his death prior to January 20, 1927."

Issue is joined by the defendant on this allegation (Record, 20).

At the conclusion of the testimony the District Court held that there was no evidence in the record to sustain the allegation above quoted and directed the jury to find a verdict for the defendant. This appeal is prosecuted from a judgment entered on this verdict.

Leslie J. Brownlee, the insured, and his friend, Al Feyerabend, had an ambition to be the first persons to climb Mount Hood in the year 1927. They were experienced in mountain climbing and had climbed Mount Hood on several previous occasions (Record, 31). On the afternoon of December 31, 1926, they went to Battle Axe Inn, which is located on the south slope of the mountain at an elevation of 4000

feet, and which is also on the Mount Hood Loop Highway.

The young men had made preparation for the climb. They were warmly clad and were equipped with snow shoes and crampons, or ice creepers. They each carried sandwiches and four thermos bottles, two filled with hot tomato soup, one with hot tea and the other with a luke-warm solution of orange and lemon juice (Record, 31).

They left Battle Axe Inn at ten o'clock on the night of December 31st and made their way to Timberline Cabin, a distance of four miles. It was after one o'clock when they reached Timberline Cabin, which is six thousand feet above sea level (Record, 31). After resting there an hour they proceeded up the mountain. The sky was overcast and the clouds hung low.

When they reached the hard snow above timber line the young men discarded their snow shoes and put on the crampons, which consist of frame work shaped like a shoe to which sharp spikes are attached (Record, 32).

They proceeded upwards between Palmer Glacier on the right and Zigzag Glacier on the left, the space between these glaciers being at least three-fourths of a mile, and this intervening space offering no serious obstacles to the climb (Record, 33).

About six o'clock in the morning they dug holes in the snow and rested until seven o'clock (Record, 42). At this time they had some hot soup and drank some tea. They then continued their climb. At a subsequent time not fixed by the testimony, but certainly long subsequent to seven o'clock, they stopped for luncheon and each ate half a sandwich (Record, 42). At ten-thirty on the morning of January 1st they were still headed up the mountain and were seen by another party behind them also making the ascent (Record, 65). At this time one of the young men was 100 feet in advance of the other. A storm had come up about nine o'clock on the morning of January 1st and the visibility was no longer good.

At a time subsequent to ten-thirty in the morning the young men were together, again partook of nourishment, and had some conversation (Record, 34, 42). Brownlee expressed the intention of turning back. Feyerabend gave Brownlee his compass and told him that a south course would bring him to the highway near Battle Axe Inn. Feyerabend continued up the mountain. Brownlee turned back and has not been seen since (Record, 34-35; 42-43).

There is no proof that the time when Brownlee parted from Feyerabend was prior to noon, at which time appellee's policy expired (Record, 53). There is clear evidence given by Feyerabend, who was a witness for appellants, that at the time when Brownlee separated from Feyerabend, Brownlee was in

good physical condition, that he talked sensibly and quietly and that he was perfectly normal except that he was tired (Record, 42-43).

After parting with Brownlee, Feyerabend continued the ascent for a time. He then turned back, reaching Timberline Cabin at 2:45 and Battle Axe Inn at 4:30 in the afternoon (Record, 41-42).

The party of four who were behind Brownlee and Feyerabend, consisting of Helen Dimmick, Helen Hansen, LaVerne Coleman and B. W. Clark, abandoned their ascent and started down the mountain at eleven o'clock in the morning (Record, 48, 66). They stopped at Timberline Cabin long enough to make a cup of tea and reached Government Camp (Battle Axe Inn) at three in the afternoon (Record, 66).

Testimony was given as to the existence of crevasses in the ice upon the mountain, particularly in the summer, and of the possibility that such crevasses were not wholly or securely covered with snow in the winter. There was no testimony as to the existence of crevasses on the south slope except in the ice fields; nor was there any testimony as to the existence of crevasses between Palmer Glacier and Zigzag Glacier.

In sustaining appellee's motion for a directed verdict (67) the court below stated (70):

> "Now in this case we may assume that these boys separated at eleven o'clock, and that the weather was all that your witnesses claim, and that the conditions were exactly as they have described them. What is there in the case whereby we can say, or whereby there is a presumption that death occurred at twelve o'clock, or five minutes before twelve, or five minutes after twelve, or at one o'clock, or at two o'clock, and what is there in the case whereby a presumption can be raised that he died at any particular place upon the side of the mountain? Now that matter, I think, would be left to the guess of the jury. The evidence in this case might be sufficient to raise a presumption that the death of deceased was caused by reason of the conditions as they existed at Mt. Hood, January 1, 1927, coupled with the fact that a diligent search has been made for him, and that he has never been found, and the length of time that has transpired since January 1st. All these facts taken together might at this time raise a presumption that death had occurred, but that is as far as it will go. To say that that presumption would give rise to another presumption that he died at a particular time, or particular place, cannot be supported by the authorities. The Supreme Court of this state has decided a number of cases very similar to this, and where the question for consideration was the cause of death, and has held that where that matter is left to the speculation, or to the guess of the jury, a verdict should be instructed. I will instruct the jury to bring in a verdict accordingly."

APPELLANTS' CONTENTION

Appellants contend that upon the evidence presented "the jury could have decided this case with an answer to the following question:

Did Brownlee, prior to noon of January 1st, 1927, fall into a crevasse on Mt. Hood, as a result and by reason of the exposure to the stormy and freezing conditions existing thereon, the effects from which he died at that time or any time prior to January 20, 1927?" (Brief, p. 10.)

ARGUMENT

Sickler's Testimony

Error is assigned on the ruling of the District Court sustaining our exception to a question asked Everett J. Sickler. In order that the court may understand the real issue raised by this assignment of error we quote so much of the record as is relevant to the question raised. The facts are set forth on pages 46 and 47 of the record.

> "Q. Now did Mr. Feyerabend, when he came back—did you ask him anything about Mr. Brownlee?
>
> A. Yes.
>
> Q. Did he make a detailed statement to you at that time?
>
> A. Yes, sir.
>
> Q. What was the statement that he made?"

Appellee objected to the testimony so called for as hearsay and incompetent and the court sustained the objection. In their brief at pages 5 and 6 appellants cite three cases, which are also cited in 22 C. J. 217, to sustain their contentions on this branch of the case. The first of these cases is—

Shear vs. Van Dyke, 10 Hun. 528.

The decision holds as follows:

A witness who aided in taking in hay was asked how many loads were taken in on the occasion specified. He answered that he could not now remember but that he knew at the time and then told the plaintiff. With this basis to support it, the court permitted the plaintiff to testify as to what the witness had told him at the time as to the number of loads of hay taken in.

It is manifest from the record which we have already quoted that appellants have not brought themselves within the rule announced in this decision. Feyerabend was the principal witness for appellants in the court below. He had been on the stand for a long time and had made his own statement as to what happened when he and Brownlee were out on the mountain. The testimony objected to called for a second hand hearsay repetition of what Feyerabend had already testified to on direct and cross examination. The statement sought to be elicited had been

made by Feyerabend to Sickler on the 1st of January, 1927. The case came on for trial on the 27th of March, 1928. The effort of appellants was to get before the jury Sickler's recollection of what Feyerabend had told him nearly fifteen months before. The admission of this testimony would have violated the fundamental rule of the law of evidence, which excludes hearsay testimony.

The record wholly fails to bring appellants within the rule announced in *Shear vs. Van Dyke,* 10 Hun. 528. Feyerabend testified:

> "That it has always been a quandary with the witness as to the time when he separated from Leslie." (39)

> "That he does not remember whether his mind was clear prior to the time that he thought anything had happened to Leslie; that he does not know whether he had a clear memory as to the time when he separated from Leslie prior to learning that something had happened to Leslie; he cannot remember because there are a lot of other things which confused him later on and out of a lot of incidents that took place, he does not remember; that his mental condition was all right when he got back to Government Camp and talked to Mr. Sickler; he has no present recollection and that he does not know whether, at the time he reached Government Camp, his recollection was clear as to the time when he and Leslie separated; that he does not have a clear recollection of when he separated from Brownlee. He does not know. If he ever had a clear recollec-

> tion it would be before the search started. At the time when he arrived at Government Camp he thinks he did have a clear recollection. He does not remember the things that took place before reaching Government Camp because of the strain of the days that followed, since he cannot remember now. He does not remember whether he remembered at the time he reached Government Camp or not the time he separated from Leslie. He has forgotten all of these things. * * * That he made an account of the trip to Mr. Sickler after he returned to Battle Axe Inn, which statement was correct." (40, 41.)

It is manifest that this testimony lays a very different foundation for the question asked than was laid in the New York case on which appellants rely.

The question asked did not relate to some specific fact which was regarded as relevant. The effort of appellants was to introduce the entire statement which Feyerabend had made to Sickler on the 1st of January, 1927.

Hearsay Rule in Oregon

Shear vs. Van Dyke, 10 Hun. 528, does not correctly state the law of evidence as codified in Oregon. *Section 705 Oregon Laws* is as follows:

> "The rights of a party cannot be prejudiced by the declaration, act, or omission of another, except by virtue of a particular relation between them."

Subsequent sections of the code list the exceptions to the hearsay rule. The most significant section following is *Section 727, subdivision 8,* which is as follows:

> "In conformity with the preceding provisions, evidence may be given on the trial, of the following facts:
>
> (8) The testimony of a witness deceased or out of the state, or unable to testify, given in a former action, suit or proceeding, or trial thereof, between the same parties, relating to the same matter."

There is no other statutory exception to the application of Section 705 supra which permits the reception in evidence of a statement previously made by a witness who sustains no relation to the parties which admits of his binding the party against whom the testimony is sought to be elicited. The construction of the foregoing statute by the Supreme Court of Oregon sustains our contention that the Oregon statutes must be regarded as a code of evidence and that hearsay testimony cannot be received in Oregon unless authority for it can be found in the Oregon code.

Hansen Rynning vs. Oregon Washington Co., 105 Or. 67, 74-73.

In this case testimony was offered under the au-

thority of subdivision 8 of Section 727 O. L. supra. The court said:

> "The statute expressly enumerates the cases in which the testimony given by a witness in a former trial may be proved on a subsequent trial. Unless the case is one coming within those enumerated by the statute, the authority conferred by the statute cannot be exercised."
>
> (Statute discussed.)
>
> "Such seems to be the rule generally in other jurisdictions."

Other authorities announcing the same principle are:

2 Jones on Evidence, p. 795.

Here it is said:

> "The failure of the witness to recollect particular facts, if short of mental incapacity, will not admit proof of his testimony at a former trial. And the mere fact that the witness has forgotten the facts to which he formerly testified is never sufficient to render evidence of his former testimony admissible."

Warren vs. Nichols, 6 Metc. (Mass.) 261.

> "The general rule is that one person cannot be heard to testify as to what another person has declared in relation to a fact within his knowledge and hearing upon the issue. It is the familiar rule which excludes hearsay. The reasons are obvious, and they are two: first, because the

averment of fact does not come to the jury sanctioned by the oath of the party on whose knowledge it is supposed to rest; and secondly, because the party upon whose interests it is brought to bear has no opportunity to cross-examine him on whose supposed knowledge and veracity the truth of the fact depends."

Stein vs. Swensen, 46 Minn. 360, 49 N. W. 55, 57.

"The defendants, having taken by deposition the testimony of Henry Vaughan, and the deposition being in court, are not in position to prove what he swore to on a former trial, on the ground of his being out of the state, even though that be a ground for it in any case. *We do not think his failure to recollect* the particular facts justifies proving his former testimony. When failure of memory amounts to mental imbecility, the witness is as one dead or insane, and, as his testimony cannot then be taken, his testimony upon a former trial of the same issues, between the same parties, may be resorted to. To admit it in any less case would continually present the question, what degree of forgetfulness shall be required."

If the statement, given under oath on a previous trial, is inadmissible, *a fortiori* is an unsworn statement given orally fifteen months before the trial inadmissible and untrustworthy.

No Prejudicial Error

In no event would the court be warranted in reversing the judgment on this assignment of error,

The offer of proof, when the court sustained our objection, was as follows:

> "We offer to prove by this detailed statement that he said that he left Leslie Brownlee at the hour of eleven o'clock and that Leslie looked at his watch at the time he left him and said to him that it was eleven o'clock, and that it was in the vicinity of Crater Rock just below." (Record, 47.)

If this testimony had been received and had been accepted by the court as proof that these two young men separated at eleven o'clock on the morning of January 1, 1927, the testimony would have had no tendency to prove appellants' case. The burden would still have rested upon appellants to show that Brownlee lost his life or sustained a fatal injury within an hour after the time when the young men separated. There is no such proof to be found in the record. Even if this testimony had been received and been regarded as legal proof we would have been entitled to our directed verdict.

Section 391 of the U. S. Code, 40 Statutes at Large 1181, is in part as follows:

> "On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties."

This court has again and again applied this statute. The construction given the statute in these decisions precludes the reversal of this case on the ground now under discussion. See for example—

Madden vs. United States, 20 F. 2d 289, 295.

> "By express provision of law (Judicial Code, Sec. 269, as amended 40 Stat. 1181 (Comp. St. Supp. 1919, Sec. 1246)), we are admonished, upon hearing a writ of error in any case, whether civil or criminal, to give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions, which do not affect the substantial rights of the parties. Upon such an examination of the record, not only are we unable to say affirmatively that there has been a miscarriage of justice, but, on the contrary, it is difficult to see how fair-minded jurors could have reached a different conclusion."

Action On Accident Policy

This is an action upon an "accident policy." The burden of proof devolves upon appellants to prove a loss within the terms of the policy. Proof of death alone is insufficient.

The policy issued by appellee was not a life insurance policy, but what is commonly referred to as an "accident policy." Leslie J. Brownlee, during the term of the policy, was insured against loss of life "resulting directly from bodily injuries sustained through purely accidental means." In order

to recover upon such a policy it is not sufficient to establish the death of the insured, but the proof must establish the occurrence of insured's death in the manner insured against in the policy.

In

Insurance Co. vs. McConkey (1887), 127 U. S. 661, 32 L. Ed. 308

where the policy insured against death "through external, violent and accidental means" the court stated on page 311:

> "Upon the whole case, the court is of the opinion that, by the terms of the contract, the burden of proof was upon the plaintiff, under the limitations we have stated, to show, from all the evidence, that the death of the insured was caused by external violence and accidental means."

Laessig vs. Travellers' Pro. Ass'n (1902), 169 Mo. App. 272, 69 S. W. 469.

> "As mere proof of injury in a damage case will not entitle a plaintiff to recover, but negligence of the defendant must be shown, so in a suit upon an accident policy, mere proof of injury or death will not entitle the plaintiff to recover, but the injury or death must be shown to be due to an accidental cause. And this burden rests upon the plaintiff irrespective of whether or not the defendant pleads or proves that the death was due to a cause excepted from the operation of the policy."

National Masonic Acc. Assoc. vs. Shryock (C. C. A. 8th, 1896), 73 Fed. 774.

This was an action upon an accident policy to recover for the death of the insured alleged to have resulted from a fall upon the pavement. There was no direct proof of the fall. In reversing a judgment for the plaintiff, the court stated on page 775:

> "The burden of proof was upon the defendant in error to establish the facts that William B. Shryock sustained an accident, and that the accident was the sole cause of his death, independently of all other causes."

To like effect see:

National Assoc. Ry. Postal Clerks vs. Scott (C. C. A. 2nd, 1907), 155 Fed. 92, 94.

Carnes vs. Iowa Travelling Men's Assoc. (1898), 106 Ia. 281, 76 N. W. 683, 684-5.

Keefer vs. Pac. Mutual Life Ins. Co. (1902), 20 Pa. 448, 51 Atl. 366.

JURY CANNOT SPECULATE

The proof required the jury to speculate as to the cause of insured's death. Where the proof requires speculation the case is properly withheld from the jury.

(1) An inference cannot be founded upon an inference or a presumption.

Section 796, Oregon Laws.

"An inference must be founded—

1. On a fact legally proved; and

2. On such a deduction from that fact as is warranted by a consideration of the usual propensities or passions of men, the particular propensities of the person whose act is in question, the course of business, or the course of nature."

Deniff vs. Charles R. McCormick & Co. (1922), 105 Or. 697, 704.

"The inference predicated upon the letterhead, that defendant was a charterer of the vessel properly did not furnish a basis for the further inference that the charter-party contained terms favorable to plaintiff's right of recovery: Sec. 796 Or. L.; State vs. Hembree, 54 Or. 463 (103 Pac. 1008); Stamm vs. Wood, 86 Or. 174 (168 Pac. 69); State vs. Rader, 94 Or. 432, 456 (186 Pac. 79)."

Joseph vs. Meier & Frank Co. (1926), 120 Or. 117, 119.

(2) Speculation as to manner of death.

Assuming that insured is dead, the proof leaves the manner of his death wholly in the realm of speculation. Based on conjecture his death may be explained in various ways, among which are the following: (1) That insured fell and sustained bodily injuries which resulted in his death; (2) that insured became lost, and having exhausted his food supply, starved to death; (3) that insured, having become tired and exhausted, stopped to rest and subsequently froze to death; or (4) that insured, because of the physical strain to which he had been subjected, died of natural causes.

The situation with respect to the proof as to the cause of insured's death is analogous to negligence cases where the evidence offered shows that the damage complained of may have resulted from a number of causes for only one of which the defendant is responsible.

Where the evidence shows that the damages complained of may have resulted from one of several causes and the defendant is responsible for only one of them, the plaintiff cannot recover.

Reading Co. vs. Boyer (C. C. A. 3rd, 1925), 6 F. (2d) 185.

This was an action to recover for the death of a

brakeman who was killed while in the employ of the defendant railway.

In reversing a judgment for the plaintiff the court stated on page 186:

> "There is no evidence which tended to prove how the accident happened. As we have stated, it might have occurred in one of several ways. The only way conceivably involving negligence of the defendant was the lack of ballast between the main track and the track of the siding. We do not concede that lack of ballast in such a place constituted negligence, yet, assuming that it did, there is no evidence which remotely indicates that the decedent 'lost his footing and was thrown under the train' because of lack of ballast. As there were other ways in which Boyer might have met his death which did not involve negligence of the defendant, the case falls, we think, within the rule of Murray vs. Pittsburgh, etc., R. R. Co., 263 Pa. 398, 403, 107 A. 21, 23, followed by this court in Philadelphia & Reading Ry. Co. vs. Cannon, 296 F. 302, wherein the Supreme Court of Pennsylvania said:
>
> " 'It is not enough for plaintiff to show his injury might have been due to more than one possible cause, for only one of which defendant is responsible. He is obliged to go further and show the cause that fastens liability upon defendant was the proximate one and the jury should not be permitted to base a verdict upon a mere conjecture that the injury was caused by one or the other.'
>
> "This is but another statement of the old rule that a party seeking to recover damages for in-

juries occasioned by negligence must establish negligence by affirmative testimony."

To like effect see:

Parmelee vs. Chicago Milwaukee Co., 92 Wash. 185, 188-191.

Shaw vs. New Gear Gold Mines Co., 31 Mont. 138, 77 Pac. 515, 516.

Wheelan vs. Chicago Milwaukee Co., 85 Ia. 167, 175; 52 N. W. 119, 121-122.

Nervinger vs. Hann, 197 Mo. App. 416, 196 S. W. 39, 42.

Miller vs. Blackburn, 170 Ky. 263, 185 S. W. 864, 866-867.

Chesapeake & Ohio vs. Whitlow, 104 Va. 90, 94, 51 S. E. 182, 183.

Harcker vs. Whitley, 124 Va. 194, 97 S. E. 808, 811.

Searles vs. Manhattan Co., 101 N. Y. 661, 662.

Dobbins vs. Brown, 119 N. Y. 188, 194-195.

Deschenes vs. Railroad, 69 N. H. 285, 46 Atl. 467, 469.

Philadelphia & Reading vs. Cannon (C. C. A. 3rd), 296 Fed. 302, 305-306.

The rule announced in the foregoing cases has also been adopted by the Supreme Court of Oregon.

Spain vs. Oregon-Washington R. & N. Co. (1915), 78 Or. 355, 369.

Plaintiff instituted this action to recover damages for his wrongful ejection from one of defendant's trains and his subsequent confinement in the city jail at Huntington, Oregon. In holding that the aggravation of the wound which was left by reason of a prior amputation of plaintiff's arm could not be considered by the jury as an element of damages, the court stated on page 369:

> "Now, from this testimony, which is wholly from plaintiff's witnesses, there may be drawn several inferences: (1) That the inflammation which ensued upon the 21st was a mere phase of an infection already shown to exist in the wound; (2) that it arose from plaintiff's activities around the race-track at Boise; (3) that it came from unsterilized dressings applied by Mrs. Simms before plaintiff's departure to Boise; or (4) that it arose from unsanitary condition existing in the jail at Huntington. There is no evidence which has a tendency to show from which of these causes the subsequent aggravated condition arose. It might have been from any of them, or, if there exists any reason to differentiate, the first of the possible causes would seem the most probable, as there can be no question under plaintiff's own testimony but that some infection resulting in a discharge of pus existed at the time he left for Boise. That his arm was not in an entirely satisfactory condition while at

> and returning from Boise is shown by his complaint, which alleges that he was 'suffering from a recently amputated arm and was then on his way to consult his regular physician.' When the evidence leaves the case in such a situation that the jury will be required to speculate and guess which of several possible causes occasioned the injury, that part of the case shall be withdrawn from their consideration: Armstrong vs. Town of Cosmopolis, 32 Wash. 110 (72 Pac. 1038). So far as the wrongful arrest, detention and imprisonment, and the filthy condition of the jail are concerned, the plaintiff made a case sufficient to go to the jury; but the court should have withdrawn from their consideration the subject of the effects of these acts upon the condition of plaintiff's arm as constituting an element in plaintiff's recovery."

Medsker vs. Portland R. L. & P. Co. (1916), 81 Or. 63.

This case involved a situation analogous to that in the present action. A lineman employed by the defendant company, while upon a pole, fell to the ground and sustained injuries resulting in his death. From the proof offered it was uncertain whether his fall was caused by shock or by losing his balance. In holding that a verdict was properly directed for the defendant, the court stated on page 69:

> "This constitutes the entire testimony relating to the cause of the injury. The death was undoubtedly occasioned by the fall, but whether the descent resulted from coming in contact with the south guy wire, or was caused by the deceased losing his balance, is problematical. In Spain

vs. Oregon-Washington R. & N. Co., 78 Or. 355 (153 Pac. 470, 475), Mr. Justice McBride, in discussing the uncertainty of such testimony, observes:

" 'When the evidence leaves the case in such a situation that the jury will be required to speculate and guess which of several possible causes occasioned the injury, that part of the case should be withdrawn from their consideration.' "

To like effect see:

Mt. Emily Timber Co. vs. O. W. R. & N. Co. (1916), 82 Or. 185, 200.

Street vs. Ringsmyer (1923), 108 Or. 349, 357.

Although the question has seldom arisen, the authorities uniformly hold that the plaintiff in an action on an "accident policy" has failed to establish a sufficient case where the jury is required to speculate as to the cause of death.

Wright vs. Order of U. T. C. (1915), 188 Mo. App. 457, 174 S. W. 833.

This was an action to recover upon an accident policy for the death of the insured, who died while operating a hand saw in a cramped position on a warm day. Expert testimony was offered by plaintiff to the effect that insured died from a ruptured

artery. In reversing a judgment for plaintiff, the court stated on pages 834 and 835:

> "But it is argued that it is competent to receive expert evidence in matters of this character, and the several witnesses for plaintiff attribute the death of the insured to the rupture of an artery, and this will suffice, for obviously it was not anticipated as a result of the act of driving a handsaw which he was performing at the time. But, though the witnesses so say, they each and all testify as well that they had no positive information touching the matter of a ruptured artery. This being true, it is essential, then, to find, through inference alone, that the insured suffered a ruptured artery. This inference, by which the ruptured artery is said to be ascertained, is based upon the fact of the pallid and congested condition appearing about the face and head of the insured, the sudden death which overcame him, and the temporary strain he underwent in the labored effort of driving the saw. But, although it be conceded that deceased came to his death from a ruptured artery, this will not suffice to authorize a recovery as for accident, because such frequently occurs, as other evidence in the case reveals, from natural causes alone and aside from accident entirely.
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> * * * * *
>
> "Therefore it is obvious that, in order to establish a right to recover, sufficient facts must be detailed in evidence to afford legitimate inferences, and it will not suffice to establish a fact in the case by drawing an inference from other facts and then undertake to establish still another fact by utilizing the fact first established through inference alone as a basis, for a

further inference of fact. In other words, as is frequently said, presumption may not be raised upon other presumptions nor inference piled upon other inferences in support of a verdict. United States vs. Ross, 92 U. S. 281, 23 L. Ed. 707; Hamilton vs. Kansas City Southern R. Co., 250 Mo. 714, 157 S. W. 622; Glick vs. Kansas City, etc. R. Co., 57 Mo. App. 97, 104; Richmond vs. Aiken, 25 Vt. 324; McAleer vs. McMurray, 58 Pa. 126; 1 Rice on Evidence, Sec. 34; Lawson's Presumptive Evidence, rule 118, p. 652; Whitesides vs. Chicago, B. & Q. R. Co., 172 S. W. 267.

"In order to find that the insured came to his death through accidental means, the jury essentially employed inference, for there is no direct evidence of the fact that he suffered a ruptured artery; and, having inferred this much, it inferred too, by resting another inference thereon, that such ruptured artery was occasioned through accidental means rather than from natural causes by the extraordinary blood pressure incident to the strain under which William N. Wright labored at the time. Although the first inference was a legitimate one, the second was not, for it was not based on competent matter of fact. Such being true, the verdict rests upon mere conjecture rather than on matter of fact deduced from the evidence."

On a rehearing of the case the court adhered to its original opinion, stating on page 836:

"Here, in the instant case, there is no positive and direct evidence that Mr. Wright, the assured, suffered a rupture of an artery, and the evidence to that effect is upon evidence entirely,

which, as above said, authorizes the jury to do no more than infer the death resulted from a rupture of an artery. Indeed, the evidence of the physicians is but inference on their part, and therefore a conclusion. Having ascertained the ruptured artery through utilizing first the inference or opinion of the physician that deceased suffered a ruptured artery, it appears that a second inference is employed in the process of arriving at the verdict to the effect that such ruptured artery resulted from accidental means rather than from a natural cause. Obviously a judgment resting upon inference piled upon inference, may not be sustained."

National Ass'n of Ry. Postal Clerks vs. Scott (C. C. A. 2nd, 1907), 155 Fed. 92, 94.

In reversing a judgment for the plaintiff in an action upon an accident policy, the court stated on page 94:

"But, let it be assumed that there was sufficient dispute upon the testimony to warrant the submission of the question as to his previous health to the jury, how then stands the case? The entire fabric of the defendant's liability is built upon the theory that Scott received an injury on November 1, 1902, at Cuba, which caused his death. This is the keystone of the plaintiff's case; if it be removed the entire structure falls to the ground. We have searched the record in vain for evidence of such an injury or, indeed, of any injury, on that day. The plaintiff testified that when her husband left home on the last day of October he was in good health, with no wound on his leg and that when he returned at 4 o'clock on November 1st he appeared sick, feeble and

weary. There was a bruise on his left shin five or six inches long and two or three inches wide; it looked red. * * *

"When, where or how this bruise was received does not appear. There is no proof that it was received at Cuba on November 1st. In fact the testimony of the trainmen is to the effect that Scott performed his duties as usual that day. He said nothing about an accident and they heard of none. The postal clerk at Hornellsville, in whose office Scott was required to register, saw him November 1st. He also saw him on his next trip November 3d. He said he was going to Cattaraugus to vote. On the night of election day he went to Salamaca intending to take his usual trip in the morning. That night he was found at his boarding house, in Salamaca, by Dr. Bourne in a serious condition from which he was aroused by hypodermics of strychnine and digitalis. On the 6th of November he went to his home where he remained until December 18th, when he was taken to the home of his son, at Dunkirk, where he remained until his death. * * *

"It is true that he had a bruise on his left shin, but everything else regarding it is left to conjecture. Instead of proving an injury received at Cuba on November 1st severe enough to produce shock, the presence of shock caused by the injury and nephritis and heart disease resulting from shock, the plaintiff's logic is in the inverse order. The argument proceeds on the following hypotheses — that death on January 25, 1903, was caused by diseases which may have been produced by shock, that shock may be caused by a severe external injury, that a bruise on the skin indicates an external injury, therefore Scott must have received such an injury on

November 1st at Cuba. It will be observed that there is a fatal hiatus between the fact that death occurred and the conclusion that it was caused alone by an external injury.

"We are of the opinion, therefore, that the court should have directed a verdict for the defendant on the ground that the plaintiff had not sustained the onus of proving that Scott's death was caused alone by external violent and accidental means.

"As there was no direct proof of this fundamental fact and as plaintiff's contention regarding it rested only upon presumption and guesswork, it was the duty of the court to direct a verdict for the defendant.

Carnes vs. Iowa Traveling Men's Ass'n (1898), 106 Iowa 281, 76 N. W. 683, 684-685.

This was an action upon an accident policy to recover for the insured's death. In reversing a judgment for the plaintiff, the court held the proof offered to be insufficient to support the judgment, and stated on pages 684 and 685:

"There are three possible ways to account for Carnes' death: (1) He may have taken the morphine with the purpose of committing suicide; (2) he may have taken more than he intended—that is, several quarter-grain tablets instead of one or more; and (3) he may have intended to take the amount he did, and misjudged the effect it would produce. There is nothing in the evidence or surrounding circumstances pointing to suicide, and, as everyone is supposed to be endowed with the instinct of self-preserva-

tion, he will be presumed not to have voluntarily ended his life. He must then have either taken more morphine than he intended, or taken what he intended and misjudged its effects. If he took more than he intended—that is, intended to take one or two quarter grains, and by mistake or inadvertence took much more—this was accidental, and, if death was so caused, the beneficiary is entitled to recover. But suppose he took just the amount of morphine he intended, and misjudged the effect it would produce; may death so occasioned be said to result from an accidental cause? Webster defines 'accidental' as 'happening by chance or unexpectedly; taking place not according to the usual course of things' —and an 'accident,' as 'an event that takes place without one's foresight or expectation; an undesigned, sudden, and unexpected event; chance; contingency. Such unforeseen, extraordinary, extraneous inference as is out of the range of ordinary calculation.' * * * It will be observed that this policy insures against death from an accidental cause, and not an accidental death. It is possible that under the definitions referred to the death of Carnes was accidental, but if he took the amount of morphine intended, and a result not anticipated occurred, then the cause of his death was not accidental, for he intended to do the very thing he did. The morphine was, under the circumstances, taken by design. The result only was unforeseen—unintended. This distinction was recognized by Judge Dyer in Barry vs. Association, 23 Fed. 712, who, in charging the jury, said: 'The term 'accident' is here used in its ordinary, popular sense, and in that sense it means happening by chance—unexpectedly; taking place not according to the usual course of things or not as expected. In other words, if a result is such as follows from ordinary means voluntarily employed, in a not

unusual or unexpected way, then, I suppose, it cannot be called a result effected by accidental means. But if, in the act which precedes the injury, something unforeseen, unexpected, unusual occurs, which produces the injury, then the injury has resulted from the accident or through accidental means.' See Id., 131 U. S. 100, 9 Sup. Ct. 775. In 3 Joyce, Ins. Sec. 2863, quoting from Clidero vs. Insurance Co., 29 Scot. L. R. 303, it is said that 'a person may do a certain act, the result of which act may produce unforeseen consequences, and may produce what is commonly called 'accidental' death, but the means are exactly what the man intended to use, and did use, and was prepared to use. The means were not accidental, but the result might be accidental.' See, also, Accident Co. vs. Carson (Ky), 30 S. W. 879. Now, it is impossible to say, from the evidence, whether Carnes took more morphine tablets than he intended to take, or whether he took just what he did intend, and misjudged their effects. Death might have been occasioned in either way, and one is as likely as the other. Under such circumstances, can it be left to the jury to guess which? The burden of proof was upon the plaintiff to show that death resulted from an accidental cause, and, the evidence leaving this unestablished, she failed to make out a case. It is said, however, that death will be presumed to have resulted from accident, and that the burden of proof is upon the defendant to show the contrary. But an examination of the cases does not sustain this contention. They go no further than to hold that, where the insured has introduced evidence tending to show an injury to be the result of an accident, the burden of proof is on the insurer to establish as a defense that the insured was within some exceptions of the policy. See Hess vs. Association

(Mich.), 70 N. W. 460; Badenfeld vs. Association, 154 Mass. 77, 27 N. E. 769; Association vs. Wiswell (Kan. Sup.), 44 Pac. 996. The plaintiff wholly failed to prove the cause to have been accidental, and this will not be presumed. It was necessary to do this in order to bring the case within the terms of the policy."

Continental Casualty Co. vs. Paul (1923), 209 Ala. 166, 95 So. 814.

This was an action upon an automobile insurance policy which insured the plaintiff against loss or damage to his automobile "resulting solely from accidental collision of such automobile with any moving or stationary object." In holding that a verdict should have been directed for the defendant by the court below, the court stated on pages 815 and 816:

> "We recognize, of course, that what is referred as the scintilla doctrine prevails in this state, but this does not at all conflict with the equally well-known rule that a conclusion as to liability which rests upon speculation pure and simple is not the proper basis for a verdict. * * *
>
> "In Am. Cast Iron Pipe Co. vs. Landrum, 183 Ala. 132, 62 South. 757, this court quoted with approval from the case of Patton vs. Tex. Pac. R. Co., 179 U. S. 658, 21 Sup Ct. 275, 45 L. Ed. 361, to the effect that, where the testimony leaves the matter uncertain and shows that any one of half a dozen things may have brought about the injury, for some of which the employer is responsible, and for some of which he is not, it is not for the jury to guess between these half a dozen causes and find that the negligence of

the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion. In St. L. & S. F. R. Co. vs. Dorman, 205 Ala. 609, 89 South. 70, discussing this question, the court said:

"'Other plausible theories may be readily suggested. Whatever conclusion may be reached, it will rest upon speculation pure and simple—a choice merely of conjectures. This court has often declared that such a conclusion is not a proper basis for a verdict.'

"In the instant case the proof discloses without conflict that the car rolled down this embankment, 50 or 60 feet in height, from which rocks and large lumps of ore protruded, and the damages sustained may readily and most naturally be attributed to this fall.

"The burden rested upon the plaintiff to show, in the language of the policy as alleged in the complaint, that the damage sustained was the result of a collision with some object either moving or stationary. There was no evidence offered of the existence of any object with which the car did or could have collided. The car was stopped upon an incline—a sufficient incline to cause the plaintiff to place rocks behind the rear wheels. If the brakes failed to hold, and the car of its own momentum, without the application of exterior force, and simply in obedience to the law of gravity, rolled down the embankment to the bottom of this cut, we are clear to the view that the damages thus sustained would not be the result of a collision with 'any moving or stationary object.'

* * * * *

"If we are to speculate, other causes may be conjectured, but, as disclosed by our decisions,

verdicts may not be rested upon pure supposition or speculation, and the jury will not be permitted to merely guess as between a number of causes, where there is no satisfactory foundation in the testimony for the conclusion which they have reached."

Keefer vs. Pacific Mut. Life Ins. Co. (1902), 201 Pa. 448, 51 Atl. 366.

The court, in affirming a judgment for the defendant in an action upon an accident policy, stated on page 366:

"We have looked in vain for any evidence upon which could be based a finding that the death was caused by external, violent and accidental means. Nor is there room for any such inference to be reasonably drawn from anything in the proofs. It is only by drawing an inference from an inference, instead of from a fact, or by basing a presumption upon a presumption, that such a result can be reached. The plaintiff's right to recover was limited, under the terms of the policy, to death from violent, external and accidental causes. If death was the result of disease, the claim made here was without foundation. The burden of proof was upon the plaintiff and how was it sustained? The jury were asked to infer — First, that the plaintiff suffered a fall; second, that the fall was accidental, and not the result of disease, such as vertigo or cerebral apoplexy; third, that death resulted as a consequence of the fall. All this in the absence of an eyewitness to the fact of accidental or external injury, and without direct evidence that there was a fall. No one testified how, when or where it occurred. No where in the testimony does there appear anything more

than a conjecture that the death was caused by accident, rather than by disease. The physician who was in attendance upon the deceased for the two or three days intervening between the first seizure and the death, and who also made the post-mortem examination, was unable to speak with any certainty or conviction as to the cause of death. The expert medical testimony was strongly in support of the theory that death resulted from uraemic poison. Under such circumstances the finding of the jury that the cause of death was accidental and external could be nothing more than a mere guess. How could a conclusion thus reached be sustained, in the absence of any direct proof as to the fact, the cause, or the effect of a fall? No presumption can with safety be drawn from a presumption."

No Proof of Fatality Within Life of Policy

The policy expired at noon on January 1, 1927. There was no competent proof of any injury prior to that time.

In addition to the fact that the indefiniteness of the proof required the jury to speculate as to the manner in which Leslie J. Brownlee may have lost his life (assuming he is dead), its condition left the time of such occurrence equally subject to conjecture. The policy issued by appellee, as stipulated (53), expired at noon on January 1, 1927. On page 10 of his brief counsel for appellants concedes that it is necessary for appellants to establish that fatal injuries were sustained by the insured prior to that time.

When last seen on January 1, 1927, Brownlee, though tired, was otherwise in good condition and spirits. His exact position on the mountain when he separated from Feyerabend was not established other than that it was somewhere below Crater Rock. There was no proof of any crevasses in that vicinity. While the weather was cold it did not prevent the movement of men clad in mountain clothes, as is demonstrated by the activities of searchers during the following week. It was not definitely established that Brownlee separated from Feyerabend prior to noon on January 1, 1927, but even if this be assumed, there is no evidence whatever to show that he suffered any injury prior to 12 o'clock on that date.

On this branch of their case appellants are complaining that the court refused to permit a verdict based only on surmise and conjecture. Appellants' argument assumes that Brownlee separated from Feyerabend at eleven A. M., one hour before the policy of accident insurance expired. Appellants' evidence is to the effect that at that time Brownlee was well, that he was suitably clad, that he had food and drink, and that he had had experience in mountain climbing. There are no facts in this record from which an inference can be drawn that he met death or fatal injury within an hour after he left Feyerabend. If the jury had so found, its verdict would have been based on sympathy, not on evidence.

In discussion of a point previously covered we have shown that a jury is not permitted to speculate as to the cause of a death or injury. This line of authority is even more clearly applicable to the point now under discussion.

If we are wrong on all our other contentions we are certainly not mistaken in our claim that appellants have utterly failed to show the time at which Brownlee lost his life or sustained a fatal injury, if he is in fact dead.

Appellee is in no wise responsible for this unfortunate situation. Appellee's contract is the measure of its liability.

Liability must be predicated, if at all, on something that happened prior to noon on the 1st of January, 1927. The burden of proof rested on appellants. This means that if appellants were to prevail they must prove a death or fatal injury during the life of the policy.

LaVerne Coleman testified (Record, 65-66), that about ten-thirty on the morning of January 1, 1927, he saw two men above him on the mountain. Counsel for appellants agrees with us in the conclusion that these two men were Brownlee and Feyerabend (Appellants' Brief, 8). The evidence on this point is clear. Coleman testifies that when he last saw Brownlee and Feyerabend one of them was a hun-

dred feet or so higher on the mountain than the other. It is apparent from Feyerabend's testimony that when the young men separated they were at the same place and that they had some conversation (Record, 34-35, 42-43). Feyerabend gave Brownlee his compass and told Brownlee that a south course would take him to the highway. The time when Brownlee turned back could not have been earlier than eleven o'clock, as is assumed in appellants' argument.

There is evidence that a storm was raging on the mountain and that there are cliffs over which a pedestrian might fall. This testimony, with the admitted fact that Brownlee has not been seen since he parted with Feyerabend, makes up appellants' case.

There is certainly no proof of death or fatal injury sustained prior to noon on the first of January, 1927.

Death From Freezing

It is contended that death from freezing is a casualty covered by the policy and *Brady vs. Oregon Lumber Co., 117 Or. 188, 199,* is cited in support of this contention. This case involved a construction of *Section 6616 O. L.,* which is a part of the Workmen's Compensation Act. This statute, in so far as it is material for the present purposes, is as follows:

> "Every workman subject to this act while employed by an employer subject to this act, who after June 30th next following the taking effect

> of this act, while so employed sustains personal injury by accident arising out of and in the course of his employment and resulting in his disability * * * shall be entitled to receive from the industrial accident fund hereby created the sum or sums hereinafter specified."

There are circumstances under which loss of life or limb by freezing may constitute an accident. The circumstances outlined in the Brady case and in the Manitoba case cited on page 14 of appellants' brief are illustrative of this principle. But the facts of the case at bar take this case without the operation of this principle.

Brownlee and Feyerabend deliberately went to the highest mountain peak in Oregon on the first of January. They knew they would encounter severely cold weather. They each wore heavy woolen underwear, woolen hiking trousers, two pairs of woolen socks, rubber shoe packs, woolen shirts, two sweaters and over all of this clothing marine suits which made them water proof from head to foot. (Record, 31.) They did not expect to freeze to death, but they intentionally went to a place where death from freezing was a danger to be guarded against. They endeavored to protect themselves against freezing as a real danger.

In the Manitoba case cited on page 14 of appellants' brief an accident left the assured at an exposed place on the prairie when the weather unexpectedly became cold and stormy.

In the Brady case some workmen were marooned at a logging camp where work had ceased for the season. They considered that it was necessary to get out to a settlement, although the ground was covered by a heavy fall of snow. The snow prevented operation of the trains and left the workmen no other way of leaving the camp except walking.

The facts in the case at bar differentiate it from the facts in the above cases. Our policy does not cover death by freezing under the circumstances disclosed by the testimony.

The language of the policy relevant to this contention is as follows:

> "Mutual Benefit Health & Accident Association does hereby insure Leslie J. Brownlee against loss of life from bodily injuries sustained through purely accidental means."

A distinction is drawn by the authorities between an accidental death and a death by accidental means. The distinction is very clearly stated in a recent California case.

Moore vs. Fidelity & Casualty Co. of N. Y., 258 Pac. 375, 377.

The deceased was a trained nurse. She was called to a hospital in San Francisco to take care of a patient who was suffering from streptococcus septicaemia. It appeared that the infection from which

the patient was suffering could be communicated through his breath to anyone in the room with him. The deceased was aware of this fact and undertook to guard against it by gargling and otherwise. She nevertheless became infected and died as the result of the infection. The court said:

> "From the foregoing epitome of the record, appearing without conflict, it is now to be determined whether the showing thus made by the plaintiff was sufficient to establish that the assured suffered death by reason of 'bodily injury sustained * * * through accidental means' as provided in the policy. It will be assumed for the purposes of this case that the contraction of the infection by the assured was a bodily injury, but we are unable to conclude that such injury was caused by accidental means. The term 'accident' as used in similar policies has been given a definition in this state that is uniform and without substantial deviation. No difficulty is encountered with reference to the definition, but problems arise in applying the definition to particular and varying states of fact. The term 'accident' is defined as 'a casualty—something out of the usual course of events, and which happens suddenly and unexpectedly, and without any design on the part of the person injured.' Richards vs. Travelers' Ins. Co., 89 Cal. 170, 26 P. 762, 23 Am. St. Rep. 455; Price vs. Occidental Life Ins. Co., 169 Cal. 800, 147 P. 1175; Southwestern Surety Ins. Co. vs. Pillsbury, 172 Cal. 768, 771, 158 P. 762; Olinsky vs. Railway Mail Ass'n, 182 Cal. 669, 189 P. 835, 14 A. L. R. 784. The burden is on the plaintiff to show that death ensued from a bodily injury sustained through accidental means. Postler vs. Travelers Ins. Co.,

173 Cal. 1, 6, 158 P. 1022; Mah See vs. North American Acc. Ind. Co., 190 Cal. 421, 213 P. 42, 26 A. L. R. 123. It must be borne in mind that the policy in question does not insure against accidental death, but against death through accidental means. 'A differentiation is made, therefore, between the result to the insured and the means which is the operative cause in producing this result. It is not enough that death or injury should be unexpected or unforeseen, but there must be some element of unexpectedness in the preceding act or occurrence which leads to the injury or death.' Rock vs. Travelers' Ins. Co., 172 Cal. 462, 465, 156 P. 1029, 1030 (L. R. A. 1916E, 1196).

"In the case at bar the means through which the fatal malady was contracted by the assured was neither unusual nor unexpected. There was no element of surprise in coming in contact with the virulent organisms. In fact, such contact was foreseen and expected. The assured knew and realized the dangers incident to the performance of her duties as an attending nurse, and by gargling, washing her hands, etc., took precautions to guard against the effect of the incident exposure. The fact that others similarly exposed did not contract the disease is not sufficient to prove that the assured contracted the same by accidental means. If the other persons present in the room from time to time (the sister and fiancee of the patient were more constantly at his bedside than the assured) had contracted the malady, there would have been no element of surprise or unexpectedness or of the unusual in so contracting the same, as they were all advised and warned of the dangers of their presence in the room. That such other persons did not fall a prey to what was an expected and anticipated attack from the germs would show no more than their resistance was greater and

> the attack unsuccessful. Effect must be given to the plain language of the policy, and a distinction must be made between the result to the assured and the means by which that result was brought about. It may properly be said that the result to the assured, namely, illness and death, was unexpected and unintentional, but that is far from saying that the means that produced the illness and subsequent death were unexpected, unusual, or not anticipated.

This decision is in line with an earlier California case cited in the opinion.

Postler vs. Travelers' Ins. Co., 173 Cal. 1, 158 Pac. 1022, 1023-1024.

The deceased in this case went to a gambling resort armed for the purpose of compelling those in charge of the resort to give him back some money he had lost in the games. In the fight which followed he lost his life. His wife was the beneficiary under an accident policy and she recovered judgment in the lower court. This judgment was reversed on appeal. We quote from the opinion of the court:

> "But the defendant relied, in addition, upon its denial that the injuries which caused Postler's death had been effected through accidental means. On this issue the burden of proof was upon the plaintiff. 'The plaintiff was bound to establish as a part of her case that death resulted from accident. It was not incumbent upon the defendant to negative accident. * * * In order to recover, the plaintiff was bound to allege and prove an injury of a kind covered by the con-

tract, i. e., one effected through external, violent and accidental means.' Price vs. Occidental Life Ins. Co., 169 Cal. 800, 802, 147 Pac. 1175; Jenkin vs. Pacific Mutual L. Ins. Co., 131 Cal. 121, 63 Pac. 180; Rock vs. Travelers Ins. Co., 156 Pac. 1029. The appellant contends, and we think upon good ground, that under any reasonable view of the evidence, the injuries suffered by Postler were not produced by accidental means, but were the natural and probable consequence of his own voluntary acts. In Western Commercial Travelers' Ass'n vs. Smith, 85 Fed. 401, 405, 29 C. C. A. 223, 227 (40 L. R. A. 653), the court said that:

'An effect which is the natural and probable consequence of an act or course of action is not an accident, nor is it produced by accidental means. It is either the result of actual design, or it falls under the maxim that every man must be held to intend the natural and probable consequence of his deeds.' "

The foregoing distinction between accidental death and death sustained through accidental means is stressed in one of the cases which we have discussed under another heading of this brief.

Carnes vs. Iowa Travelling Men's Association, 106 Ia. 281, 76 N. W. 683, 684-685.

The Oregon court has announced this same rule.

Kendall vs. Travelers' Protective Assn., 87 Or. 179, 190, 191-192.

There was an attempt in this case to recover dam-

ages caused by blood poisoning in the removal of an ingrowing hair from the skin of the assured by a barber. The first opinion in the case was written by Mr. Justice Burnett. We quote therefrom:

> "We note that the defendant does not insure merely against injuries although they might constitute an unexpected effect. The damage, whether anticipated or not as a result, must have happened through accidental, violent and external means. All three of these ingredients must unite to form the cause of the subsequent hurt before there can be a recovery under the admitted terms laid down in the constitution and by-laws of the defendant. A man's leg might be broken by a runaway team coming suddenly upon him from behind. He might reasonably expect to be confined to his bed for some weeks and yet the cause of the fracture would be accidental. On the other hand, he might purposely inflict upon himself a slight pin scratch which would ordinarily pass unnoticed and septicaemia might ensue and unexpectedly amputation of the injured part might become necessary, yet the scratch would not be accidental. In other words, under such a policy as this the liability must be determined by causes rather than consequences.
>
> * * * * *
>
> "The jury might consider that it was impossible to perform the required operation without making some incision of the skin so as to reach the hair growing underneath, and that on that account the barber intentionally and with the implied consent at least of the plaintiff, made the cut which afterwards became infected. This would not be an unwarranted conclusion from the plaintiff's own testimony. If, therefore, the wound was made intentionally it would not come

within the meaning of the term 'accidental means.' ''

The case went back for retrial and plaintiff again secured judgment. This judgment was reversed by the Supreme Court, Mr. Justice Harris writing the opinion. *See 95 Or. 569, 574, 575.* We quote from the opinion:

> ''The court refused to give the following instruction requested by the defendant:
>
> 'The jury is instructed that if plaintiff directed the barber to remove the ingrowing hair from his chin, and the barber proceeded to remove the hair under instructions from plaintiff, plaintiff cannot recover in this case, even though the work of the barber was unskillfully done, and the results were such as neither plaintiff nor the barber anticipated.' ''
>
> * * * * *
>
> ''The refusal to give the instruction, as requested by the defendant, permitted the jury to find the element of accident in the unskillfulness of the barber, if there was any. Moreover, the requested instruction is in complete harmony with the announcement made by the opinion delivered on the first appeal that 'the liability must be determined by causes rather than consequences.' ''

This case has been cited with approval in the recent case of—

Dodeneau vs. State Industrial Acc. Com., 119 Or. 357, 361.

Here Mr. Justice Coshow said:

> "Oregon is committed to the first line of cases—that is in order for the insured to recover under the ordinary policy of accident insurance it is necessary for the injury to have been caused by accidental means; it is not sufficient that the result only should have been accidental; Kendall vs. Travelers' Protective Association, 87 Or. 179 (169 Pac. 751). An illustration of the liability of an insurer against accidental injury as construed in the Kendall case may be aptly made thus: A person accidentally scratches his hand on his tie pin which unknown to him protrudes beyond his tie. The scratch occurs by chance. It is a mishap. In itself it is trivial but owing to some unforeseen and unknown circumstances blood-poisoning results and death follows. The insurer would be liable under the policy. Another man intentionally uses his tie pin to remove a sliver in his hand or to open a blister and blood-poisoning unexpectedly results causing the insured's death. His beneficiaries cannot recover under the policy because he intentionally used the pin in the way and manner he did."

The application of these authorities to the case at bar is clear. Leslie Brownlee intentionally went on Mt. Hood in the winter. He anticipated cold weather and knew that freezing would occur if he remained out on the mountain indefinitely. He guarded against

this contingency by putting on the warmest kind of clothing and taking precautions which are set forth fully in the testimony of Mr. Al Feyerabend, who was appellants' principal witness. Brownlee did not expect to be frozen but the cold temperature, the snow and the storm were anticipated, and if he died as the result of these conditions he did not die by accidental means.

We have thought it our duty to make the foregoing argument, although there is no proof that Brownlee lost his life by freezing and the evidence strongly negatives any contention that he was frozen prior to noon of January 1, 1927, the time when the policy expired.

Appellants' Authorities

The authorities relied on by appellants are readily distinguishable from the case at bar. We have already discussed several of them. The remaining cases, with a single exception, are life insurance cases, and the excepted case is a libel in admiralty involving no question of accident insurance.

Fidelity Mutual vs. Mettler, 185 U. S. 308, 46 L. Ed. 922, 929.

This was an action brought on a life insurance policy taken out by William Gay Hunter. He disappeared for fifteen days. At the end of that time a

search was made for him and strong circumstantial evidence was produced tending to show that he had drowned in the Pecos River. This evidence is abstracted on pages 309 to 311 of the official report. The facts are wholly unlike the facts in the case at bar and it would serve no good purpose to publish them in this brief.

If the issues in the Mettler case had required proof that Hunter had died at a particular hour, we think the court would have been compelled to withdraw consideration of the case from the jury.

The San Rafael, 141 Fed. 270.

This is a decision of this court. It was an admiralty case growing out of the collision of the San Rafael and the Sausalito. The only portion of the opinion which is relied upon as relevant to the present controversy has to do with the claim based on the alleged death of Alexander Hall. Hall lived near Sacramento, where he had a family of seven minor children. He was a good father, mindful of his responsibilities to his children, and so circumstanced that there was no room for suspicion of suicide or of wilful disappearance. He left Sacramento with the intention of going to San Rafael to see his brother-in-law. The evidence traced him to the ferry Berkeley on which he left Oakland Mole on a schedule which permitted him to make the ferry San Rafael bound for Sausalito. There was evidence that a man

answering Hall's description was on the San Rafael at the time of the collision and that he was in a position on the San Rafael which would have made it almost impossible for him to escape drowning when the San Rafael sank. This court held that these facts were sufficient to prove the death of Hall, particularly in view of the length of time which had elapsed after his disappearance and before the trial.

Continental Life vs. Searing, 240 Fed. 653.

This was a decision by the Circuit Court of Appeals for the Third Circuit. Actions were brought on two life policies. The insured had been in bad shape physically. "The muscles of his foot were so bound that over-exertion tended to cramp his lower limbs." He also had "high blood pressure indicating heart deterioration." On the day when he was last seen he "complained of abdominal cramp" and "of being warm and tired." There was evidence that shortly before his disappearance he had over-exerted himself. Under these conditions the insured went in bathing in the surf at Atlantic City and was never seen again. He was actively engaged in business and so circumstanced that there was no foundation laid in the testimony for the suggestion that he had wilfully disappeared. The court held that under these circumstances, especially after the lapse of a considerable time, it was competent for the jury to find that the insured was dead.

Northwestern Mutual vs. Stevens, 71 Fed. 258, 261.

George D. Stevens was the cashier and manager of a bank. He had not accounted for funds which came into his hands. The capital of his bank was impaired and the bank examiner was about to close it. Under these circumstances he disappeared. His wife sued on insurance policies alleging that he was dead. Judge Sanborn, in discussing the case, used the language quoted on page 15 of appellants' brief. We do not regard this statement by the court as applicable to the facts in the case at bar, but in any event it was mere passing language of the court not called for by any of the facts which were in evidence in the case then under consideration.

Lancaster vs. Washington Life, 62 Mo. 121.

This was an action on a policy of life insurance on the life of Thomas H. Touhey. The evidence showed that the insured took passage from Chicago to Detroit on the Badger State. On the arrival of the vessel at Detroit he was missing. While the vessel was still in Lake Huron and nearing the southerly end of this lake Touhey had been seen on deck. He was in bad health and the circumstances indicated that he had jumped over or fallen over. It was held that the testimony was sufficient to entitle a jury to find that the insured was dead.

Carpenter vs. Supreme Council, 79 Mo. App. 597.

This action was based upon a fraternal certificate of insurance. The question mooted was the death of Carpenter who disappeared on the 3rd of January, 1897. He had been unfortunate in his business undertakings, had no income whatever, and was dependent on charity. He had frequently expressed an intention to commit suicide. The circumstances under which he left home on the day of his disappearance strongly indicated a suicidal purpose. He was last seen on the banks of the Mississippi River at St. Louis at a time when the river was full of ice. In the last conversation which the evidence disclosed he expressed a desire or intention to jump into the river. The court held that this testimony authorized the jury to find that Carpenter was dead.

Tisdale vs. Connecticut Mutual, 26 Ia. 170.

This was an action on a policy of life insurance. The insured visited Chicago on the 25th of September, 1866, on business. He was last seen at the corner of Lake and Clark streets in that city. He was a man of exemplary habits and happy domestic relations. He also had fair business prospects. His prolonged disappearance coupled with the foregoing facts was held to be evidence sufficient to submit to the jury the question of his death. The length of time that he had been missing at the time of the trial in the lower court does not appear but the case was decided on appeal more than two years after his disappearance.

CONCLUSION

The proof in the case at bar required the jury to speculate (1) as to whether Brownlee sustained any injuries within the terms of the policy, and (2) whether such injuries, if received, occurred prior to twelve o'clock noon on January 1, 1927. Because of this condition of the proof the direction of a verdict for appellee should be affirmed.

Respectfully submitted,

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NO. 5481

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JOSEPH BROWNLEE AND
BARBARA BROWNLEE,
Appellants,

vs.

MUTUAL BENEFIT HEALTH &
ACCIDENT ASSOCIATION
Appellee.

Appellee's Petition for Rehearing

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Attorneys for Appellee.

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INDEX

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MUTUAL BENEFIT HEALTH &
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Appellee.

Appellee's Petition for Rehearing

Appellee respectfully prays the court to grant a rehearing of the above entitled cause for the following reasons:

ARGUMENT

On page 3 of the prevailing opinion we find the following language:

> "If as contended there is no evidence in the record from which the jury may do other than

speculate or guess as to the cause of death, then the judgment should be affirmed.

Reading Co. vs. Boyer (C. C. A. 3rd), 6 Fed. (2d) 185.

Philadelphia & R. Ry. Co. vs. Cannon (C. C. A. 3rd), 296 Fed. 302.

Spain vs. Oregon-Washington R. & N. Co., 78 Ore. 355.

Medsker vs. Portland R. L. & P. Co., 81 Ore. 63."

The court has accepted the foregoing principle as the touchstone by which to determine the sufficiency of the case made by plaintiffs.

CASES CITED IN OPINION

In support of the conclusion reached that appellants offered testimony sufficient to go to the jury in this case, the court on pages 9 and 10 of the opinion cites the following cases:

Northwestern Mutual Life vs. Stevens, 71 Fed. 258.

Carpenter vs. Supreme Council, 79 Mo. App. 597.

Tisdale vs. Insurance Company, 26 Iowa 170.

Lancaster vs. Washington Life, 62 Mo. 121.

These were all life insurance cases. The ultimate fact to be established by plaintiff in each of these

cases was the death of the insured. In this case it is necessary for appellants not only to prove the death of Leslie Brownlee but also that he sustained a fatal accident and that the accident happened prior to noon of January 1st. We concede that the long absence of Leslie Brownlee following his separation from Al Feyerabend on Mt. Hood on the 1st of January, 1927, coupled with the fact that he had no indebtedness, was in good health and had no serious trouble so far as known, makes a case sufficient to submit to the jury on the question of whether or not he is dead. We claim, however, that the testimony contained in the record wholly fails to show that he died by accident and especially that he died by an accident sustained prior to noon of January 1st, 1927.

On page 9 of the prevailing opinion the court quotes from Judge Sanborn's opinion in Northwestern Mutual Life vs. Stevens with reference to the presumption arising when one is last seen in a position of imminent peril. On page 262 of 71 Fed. and in the same opinion Judge Sanborn says:

> "There was no proof that the insured was last seen in the presence of an imminent peril that might properly cause his death."

The statement quoted was therefore made arguendo and was not necessary to the decision of the case which was before the court.

On page 260 of the report the court stated:

"It is a general rule that a state of facts once shown to exist is presumed to continue until a change, or facts and circumstances inconsistent with its continued existence, are proved. A living man is presumed to continue to live until the contrary is shown or is presumed from the nature of the case. All the authorities concur in the general proposition that the presumption of life continues seven years after the unexplained disappearance of a man under ordinary circumstances, from whom no tidings return to his friends or acquaintances, and that then the presumption of life ceases and the presumption of death arises."

On page 261 the court states:

"It is conceded that when one who is last seen in a state of imminent peril that might probably result in his death is never again heard from though diligent search for him is made, the inference of immediate death may be drawn."

Further on the same page the court stated:

"On the trial of this case there was no request for a peremptory instruction to the jury to find this important fact either way and hence the question whether or not there was sufficient evidence in the case to warrant the finding of the death of the insured before the commencement of these actions is not presented for our consideration. That question was sent to the jury by common consent."

The court also refers to the case of

Carpenter vs. Supreme Council Legion of Honor, 79 Mo. App. 597,

as supporting the principle stated in 71 Fed. 216, *supra.*

The facts in this case do not show danger of involuntary death, but rather an intention to commit suicide and an opportunity to do so by jumping in the river. The word "peril" is used in the opinion, but it is used only with reference to the psychological condition of the insured. On pages 600-602 of the report the Missouri Court discusses the facts with emphasis on the suicidal tendencies of the insured. The court then says:

> "It is a psychological truth that a mind revolving the thought of self-destruction and ultimately deciding to put it into execution, is in an abnormal condition and becomes a constant source of ready peril to its possessor dependent on the opportunity for effecting its purpose. When last seen Mr. Carpenter was near the river; it was nightfall; he was oppressed with past failures, in dire need in the present and hopeless of the future, and by his own confession bent upon putting an end to his life. His last words indicate that he had grasped the opportunity presented by the river and intended to use it. To say under these circumstances that he was not then in a position of particular peril, would be to ignore the known law of mental science subjecting the will and action to the dominance of an idea which has mastered the intellect."

Plaintiffs' evidence in the case at bar shows affirmatively that Brownlee's mental condition was normal (Record 42-43).

The Missouri decision has no tendency to show that Brownlee was in a state of imminent peril when he parted with Feyerabend.

The next case cited is

Tisdale vs. The Connecticut Mutual Life Ins. Co., 26 Iowa 170.

This case involved no question of imminent peril to the insured. The question was whether an inference of death could be drawn from the absence of insured for a period approximating two years, the evidence showing that his family relations were happy and his business was fairly prosperous. The court holds that death may be established prior to seven years without showing the existence of danger or peril, but states on page 175:

> "The first instruction announces the rule that the death of an absent person cannot be presumed, except upon evidence of facts showing his exposure to danger, which probably resulted in death, before the expiration of seven years from the date of the last intelligence from him; and that evidence of long absence without communicating with his friends, of character and habits, making the abandonment of home and family improbable, and of want of all motive or cause for such abandonment which can be supposed to in-

fluence men to such acts, is not sufficient to raise a presumption of death."

This instruction was held to be erroneous.

The case cannot be said to support the proposition for which it is cited by the court.

The next case cited is that of

Lancaster vs. Washington Life Insurance Co., 62 Mo. 121.

This case also does not support the proposition for which it is cited, as is shown by the following language on page 128 of the opinion:

> "The rule contended for by the defendant is, that where the evidence of death is circumstantial only, the jury are not warranted in inferring death, unless the evidence shows that the party whose death is sought to be established, was, when last heard from, in contact with some particular peril calculated to shorten or destroy life. The rule as thus stated, while it has the support of some distinguished names, and is undoubtedly correct as far as it goes, is much more restricted than that laid down in the case of Tisdale vs. The Conn. Mut. Life Ins. Co. (26 Ia. 170), and which has received the approval of this court in the case of Hancock, Adm'r of Morris, vs. The American Life Ins. Co. ante, p. 26."

We will now turn to the case of

Hancock vs. The American Life Ins. Co., 62 Mo. 26,

referred to in the language quoted above. The court in this case points out the distinction which we have

heretofore stated, namely, that where the insured is seen in such a condition that he is exposed to the perils of disease or accident, his death may be presumed at a time short of seven years, but his death is not presumed *eo instante* after he was last seen. On page 32 the court states:

> "Mere absence, unattended with other circumstances, will not be sufficient. In Eagle's case (3 Abb. Pr., 218), it was said that, if it was attempted to apply the presumption short of seven years, special circumstances would necessarily have to be proved; as for example, that at the last accounts the person was dangerously ill, or in a weak state of health, was exposed to great perils of disease or accident; that he embarked on board of a vessel which has not since been heard from, though the length of the usual voyage has long since elapsed. In all such cases, if the circumstances known are sufficient to authorize the conclusion, the decease may be placed at a time short of seven years."

The court also refers to *17 C. J. 1169.* In order to make clear the text of the author of that work, we quote from the text beginning at paragraph 5 on page 1166:

> "The presumption of the continuance of life, is overcome or displaced by the presumption of death which arises from the unexplained absence of a person from his last or usual place of residence for a sufficiently long period of time without having been heard of during such period, although it has been said that, in the absence of a statute, mere lapse of time since a person was last heard from is not sufficient evidence of

death. The presumption of death from unexplained absence is not, however, a presumption of law, but a mixed presumption of law and fact, which may be rebutted, and it will not be indulged where the circumstances of the case are such as to account for the absence of the person without assuming his death; and it has been held that he who relies upon an unexplained absence must not only prove it, but must also produce evidence to justify the inference that death is the probable reason why nothing is known about the missing person.

"At common law the rule was that a presumption of death arose from an unexplained absence of seven years, and this is the rule which prevails in nearly all jurisdictions, although in a few jurisdictions a shorter period has been prescribed by statute.

"The presumption of death from seven years' absence does not preclude an inference that death may have occurred before the expiration of such period where there are circumstances which would justify a conviction that death occurred at an earlier date, as for instance that the absent person, during the period after his disappearance encountered some specific peril, or was subject to some immediate danger calculated to destroy life, or where the circumstances are such as to make it improbable that he would have abandoned his home and family, or that when he left home he was in poor health or in a precarious physical condition."

With respect to the subject of time of death, the author of the same text states on page 1174:

"There is much confusion among the cases, sometimes among those in the same jurisdiction,

> upon the question whether the presumption of death from seven years' absence raises any presumption as to the time of the death. * * * The party alleging death before the expiration of the seven years must prove it, and according to some authorities, where the legal limit of seven years is not relied on stronger proof is required to raise a presumption of death than if the absence had continued until the expiration of that period."

As we have already pointed out, the cases cited in the prevailing opinion and discussed by us *supra* were all life insurance cases. The death of the insured was the circumstance alleged on the one side and denied on the other. In none of these cases was it essential to prove death by accident or at a particular hour.

NOT A CASE OF IMMINENT PERIL

We do not question that an inference of death may be properly drawn from evidence that a party was last seen in a state of imminent peril. Such an inference might properly be drawn from the fact that a man was last seen on a sinking ship or in a burning building.

This is not such a case. Leslie Brownlee when he parted with Feyerabend was at a place where he went voluntarily. He was an experienced mountaineer (Record 31); he had climbed Mt. Hood several times and must have had some familiarity with the terraine; he was equipped to cope with the conditions

which were to be found on the mountain. He wore heavy woolen underwear, woolen hiking trousers, two pairs of woolen socks, rubber shoe packs, a woolen shirt, two sweaters and over that clothing a marine suit which made his clothing waterproof from head to foot. When he left Battle Axe Inn he carried a pack sack in which there were four thermos bottles, two of them filled with hot tomato soup, one with hot tea, one with a lukewarm solution of orange and lemon juice. (Record 31.) He and his companion also had some solid food with them (Record 42). The testimony indicates that at the time when Brownlee separated from Feyerabend a large part of this nourishment was still intact. Brownlee had beavertail snowshoes for use when walking on snow and crampons for use when he came to ice (Record 32). He was twenty years of age (Record 62), and was in good physical condition (Record 42-43). Mr. Feyrabend, who was a witness for appellants, says on pages 42-43 that Leslie Brownlee was quite muscular; that he was not of a wiry build but that he could stand a lot of hiking; that he was not nervous but was well poised; when the two young men separated Brownlee talked sensibly and quietly and was perfectly normal except that he was tired from the climb. Brownlee took with him a compass and he was correctly advised that a south course would take him to the highway. (Record 34-35.)

Brownlee gave up his attempt to ascend the mountain not because he was conscious of any danger, but because "he did not feel like the climb was worth the effort." (Record 34.)

Feyerabend after going further up the mountain returned to Battle Axe Inn at 4:30 P. M. (Record 40.) The party of four who were a short distance behind Brownlee and Feyerabend, consisting of Helen Dimmick, Helen Hansen, Basil Clark and LaVerne Coleman, had no difficulty in getting back to Battle Axe Inn at 3 o'clock on the afternoon of January 1st (Record 65-66).

It is true that there were on the mountain cliffs over which one might fall and crevasses into which one might stumble. It is respectfully submitted that the possibility of such an accident does not constitute imminent peril.

In—

U. S. vs. Outerbridge, 27 F. C. 390, 392; 5 Sawy. 620,

Mr. Justice Field says:

> "By imminent danger is meant immediate danger, one that must be instantly met."

This language is followed by the Oregon Supreme Court in

State vs. Smith, 43 Ore. 109, 116.

In—

Eckhardt vs. City of Buffalo, 46 N. Y. S. 204, 211,

it is said:

> " 'Imminent' denotes that something is ready to fall or happen on the instant."

It was held in that case that the circumstances relied upon did not constitute imminent peril.

The word "imminent" is derived from "imminere" which means to project over, overhand. We think the testimony wholly failed to show a situation to which the expression "imminent peril" can be properly applied.

PRESUMPTIONS APPLICABLE

The presumptions do not help these appellants. In

1 Jones on Evidence (3rd Ed.), Sec. 60,

it is said:

> "When a person is shown to have been living at a given time, the continuance of life will be presumed until the contrary is proved or is to be inferred from the nature and circumstances of the case."

This language is approved by the Supreme Court of Illinois in

> *Chicago & Alton vs. Keegan,* 185 Ill. 70, 56 N. E. 1088, 1090.

In re Hall, 1 Wall. Jr. 85, 11 F. C. 204, 209,

Judge Baldwin says:

> "The life of a person once shown to exist is intended to continue until the contrary is proved or is presumed from the nature of the case."

Section 799, Oregon Laws, Subdivisions 26 and 33,

is as follows:

> "All other presumptions are satisfactory unless overcome. They are denominated disputable presumptions and may be controverted by other evidence. The following are of that kind:
>
> "26. That a person not heard from in seven years is dead.
>
> "33. That a thing once proved to exist continues as long as is usual with things of that nature."

If we eliminate from the case the element of time which has elapsed since Brownlee separated from Feyerabend, the evidence would certainly not warrant the conclusion that Brownlee is dead. The evidence shows that a diligent search was made for Leslie Brownlee and that this search continued for a week after January 1st, 1927. Those engaged in this search did not believe him dead. This circumstance is important in determining whether there was evidence sufficient to go to the jury on the question of fatal accident prior to noon of January 1st. The long time which has since elapsed without tidings from

him may justify the inference that he is dead, but we respectfully submit that it does not justify the inference of death by accident; it certainly does not justify the inference of fatal accident within an hour after Brownlee separated from Feyerabend.

An excellent case dealing with the presumptions arising on the disappearance of a party is

Goodier vs. Mutual Life, 158 Minn. 1, 196 N. W. 662.

This was an action brought upon a life insurance policy and the contention of plaintiff was that the death of the insured was to be inferred from his disappearance. The disappearance took place on the 14th of November, 1914, and the policy remained in force by its terms for four years thereafter. The testimony showed that the insured was a man of good standing in the community where he resided, that his family relations were happy, but that he had been guilty of some peculations which were about to be exposed. The case was submitted to the jury and the jury found for plaintiff. The court thereafter sustained a motion of the defendant for judgment notwithstanding the verdict and the action of the trial court in sustaining this motion was upheld by the Supreme Court of Minnesota. The case is interesting because the court overrules the earlier Minnesota case of

Behlmer vs. Grand Lodge, 109 Minn. 305, 26 L. R. A. (N. S.) 305, 123 N. W. 1071.

The court held that to permit the jury to assume or infer the death of the insured within four years of his disappearance on the record in that case "would remove cases of this kind from the control of law and permit their decision by wholly uncontrolled and always differing notions of fact."

LEGAL EVIDENCE REQUIRED

The burden was on plaintiffs in the court below to prove that a fatal accident was sustained and that this accident took place prior to noon of January 1st. If the testimony be regarded most favorably to plaintiffs it proves the mere possibility of facts entitling plaintiffs to recover.

In—

Martini vs. Oregon Washington Co., 73 Ore. 283, 288, it is said:

> "In order that a verdict may be supported by the evidence, there must be some legal evidence tending to prove every material fact in issue, as to which the party in whose favor the verdict was rendered, had the burden of proof."

This was a case where an appeal had been taken from an order setting aside a judgment and granting a new trial. The above language is followed by the Oregon Supreme Court in two later cases.

Schneider vs. Tapfer, 92 Ore. 520, 545-546.

Maupin Warehouse Co. vs. Fleming, 121 Ore. 531, 537.

Under the conformity rule the law of evidence as declared by the Oregon Supreme Court is applicable to this case. We respectfully contend that there is no legal evidence to prove an accident sustained by Leslie Brownlee and especially no legal proof to sustain the contention that such an accident took place prior to noon of January 1st, 1927. Proof that he was at a place where it was possible to sustain a fatal accident does not meet the requirements of the Oregon authorities.

INFERENCE FROM SEARCH

At the top of page 9 of the prevailing opinion we find the following sentence:

> "The search which the evidence showed was made was sufficient to leave it a question for the jury to determine whether death was the result of accident or one of the other possible causes."

It is unnecessary to call the attention of the court to the fact that the results of the search were wholly negative.

In the sentence quoted the court probably intends to hold that the failure to find the body of Leslie Brownlee justified the jury in assuming that he had fallen into a crevasse. This we think is carrying the doctrine of circumstantial evidence to an extent not warranted by sound reason. It should be borne in mind that plaintiffs' testimony shows that there was

a continuous snowfall on Mt. Hood from January 1st to 6th inclusive. (Phillips, Record 51, 53.) Plaintiffs' testimony also showed that on certain parts of the mountain the snow is perpetual. (Phillips, Record 53; Stadter, Record 55.) The foregoing testimony is entirely uncontradicted. The failure to find any trace of Leslie Brownlee may be accounted for by the fact that he was buried in snow at a point on the mountain so high that he was not uncovered in the following summer.

It may be said that the jury were not bound to reach this conclusion. We answer that it is a conclusion as much warranted by the testimony as is the assumption that Brownlee fell into a crevasse. This latter conclusion can be reached only by surmise and speculation.

Even if it can be properly assumed that Brownlee fell into a crevasse, this assumption does not make out a case for these appellants. Before they can recover they must prove a fatal accident occurring before noon on January 1st. If we assume that there was a fatal accident where is there a syllable of testimony from which the conclusion can be drawn that it occurred within the life of appellee's policy?

Plaintiffs' contention is that Brownlee and Feyerabend separated at 11 A. M. (Record 47). To pass up to the jury the question of whether there was a fatal accident within an hour after that time is to

invite a verdict based wholly on speculation or surmise. This is the practice which is condemned in

Reading Co. vs. Boyer, 6. F. (2d) 185.

Philadelphia & Reading Co. vs. Cannon, 296 Fed. 302.

Spain vs. Oregon Washington Co., 78 Ore. 355.

Medsker vs. Portland Railway Co., 81 Ore. 63.

The court accepts the law laid down by these authorities. It is submitted with deference that the prevailing opinion fails to apply the law to the facts disclosed by this record. There is a failure to distinguish between possibility and proof. The majority opinion permits the jury to assume that there was a fatal accident within the life of appellee's policy on evidence which merely points to the possibility of such an accident.

We have again read the record with care and have found no testimony negativing the assumption (2) that insured became lost, and having exhausted his food supply, starved to death; (3) that insured, having become tired and exhausted, stopped to rest and subsequently froze to death; or (4) that insured, because of the physical strain to which he had been subjected, died of natural causes.

If the case had been submitted to the jury and the jury had eliminated these hypotheses from the case,

we contend they would have acted on mere surmise and their verdict would have been based on speculation rather than proof.

Believing that the court has misapprehended the condition of the record and the rights of the parties thereunder, we respectfully petition for a rehearing.

McCamant & Thompson,
Attorneys for Appellee.

No. 5483

United States Circuit Court of Appeals

For the Ninth Circuit.

JOSE GANDARA,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

Transcript of Record.

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT OF THE DISTRICT OF ARIZONA.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Index. Page

Index. Page

Index. Page

Index.

NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

W. H. FRYER, El Paso, Texas,
JAMES D. BARRY, Tucson, Arizona,
Attorneys for Plaintiff in Error.

JOHN B. WRIGHT, United States Attorney, Tucson, Arizona,
CLARENCE V. PERRIN, Assistant United States Attorney, Tucson, Arizona.
Attorneys for Defendant in Error.

In the District Court of the United States for the District of Arizona.

C.–3446.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

JOSE GANDARA, ESTEBAN BORGARO, Jr., ANTONIO VALENZUELA, *alias* CHITO VALENZUELA, and BISHOP NAVARETTE,
Defendants.

INDICTMENT.

Vio. Section 37, Federal Penal Code of 1910. Conspiracy to Violate Section 13 of the Federal Penal Code.

United States of America,
District of Arizona,—ss.

In the District Court of the United States, in

and for the District of Arizona, at the May term thereof, A. D. 1927.

The Grand Jurors of the United States, impaneled, sworn and charged at the term aforesaid, of the Court aforesaid, on their oath present, that JOSE GANDARA, ESTEBAN BORGARO, Jr., ANTONIO VALENZUELA, *alias* CHITO VALENZUELA, and BISHOP NAVARETTE, hereinafter called the defendants, whose full and true names are, and the full name of each of whom is other than as herein stated to the Grand Jurors unknown, each late of the District of Arizona, heretofore, to wit, between the 1st day of May, A. D. 1927, and the 20th day of June, A. D. 1927, at a point near Tucson, Pima County, State and District aforesaid, the exact location of which is unknown to the Grand Jurors and within the jurisdiction of the United States and of this Honorable Court, did knowingly, willfully, unlawfully, feloniously and corruptly conspire, combine, confederate and agree together and with divers other persons, whose names are to the Grand Jurors unknown, to commit an offense against the United States of America, to wit, the offense of knowingly, wilfully, unlawfully and feloniously beginning, setting on foot and providing and preparing the means for a certain military enterprise to be carried on [1*] from the State of Arizona, within the United States of America, against the Territory of a certain foreign country, to wit, the Republic of Mexico, with whom the United States throughout said period of

*Page-number appearing at the foot of page of original certified Transcript of Record.

time were at peace, which said offense is defined by Section 13 of the Federal Penal Code, that is to say, at the time and place aforesaid, the said defendants did conspire to set on foot and provide and prepare the means for an enterprise, having for its objects the inciting of armed rebellion in the Republic of Mexico, of the citizens of said Republic of Mexico, against the Government and authority there, and the furnishing of arms, munitions, supplies and money for carrying on and supporting such rebellion, and an enterprise which was to be carried on from Tucson, Arizona, aforesaid, by the said defendants, devising the plan of the same there.

The said conspiracy, combination, confederation and agreement was continuously throughout all of the times in this indictment mentioned, in operation and existence.

OVERT ACT I.

And the Grand Jurors aforesaid, on their oath aforesaid, do further present:

That, in furtherance of said conspiracy, and to effect the object and purpose thereof, and on or about the 25th day of May, A. D. 1927, near Tucson, in the State and District aforesaid, the said defendants, JOSE GANDARA and BISHOP NAVARETTE, did meet with certain Yaqui Indians, and did urge said Yaqui Indians to band together and form a warlike enterprise and did urge, exhort and entice said Yaqui Indians to prepare to enter the said Republic of Mexico from the said State of Arizona under the leadership of the said JOSE GAN-

DARA and to make war upon the said Republic of Mexico.

OVERT ACT II.

And the Grand Jurors aforesaid, on their oath aforesaid, do further present:

That, in furtherance of said conspiracy, and to effect the object and purpose thereof, and on or about the 1st day of June, A. D. 1927, at Tucson, within said State and District aforesaid, the said JOSE GANDARA did arrange with the said ESTEBAN BOGARO, Jr., to order for shipment to Tucson, Arizona, seventy-five 30–30 caliber Winchester [2] rifles for the use of said Yaqui Indians, for the purpose of using said rifles as aforesaid, in a revolutionary movement against the said Republic of Mexico.

OVERT ACT III.

And the Grand Jurors aforesaid, on their oath aforesaid, do further present:

That in furtherance of said conspiracy, and to effect the object and purpose thereof, the said ESTEBAN BORGARO, Jr., on or about the 6th day of June, A. D. 1927, at Tucson, in the State and District aforesaid, and within the jurisdiction of this Court, placed an order with Dunham, Carrigan & Hayden Company of San Francisco, California, for seventy-five 30–30 rifles to be shipped to Tucson, Arizona, by American Railway Express.

OVERT ACT IV.

And the Grand Jurors aforesaid, on their oath aforesaid, do further present:

That, in furtherance of said conspiracy, and to

effect the object and purpose thereof, the said ESTEBAN BORGARO, Jr., on or about the 9th day of June, A. D. 1927, at Tucson, in the State and District aforesaid, and within the jurisdiction of this Court, called at the office of the American Railway Express Company in Tucson, Arizona, and directed that said shipment of rifles be delivered to the store of the said ESTEBAN BORGARO, Jr., in the said city of Tucson, Arizona.

OVERT ACT V.

And the Grand Jurors aforesaid, on their oath aforesaid, do further present:

That, in furtherance of said conspiracy, and to effect the object and purpose thereof, the said ESTEBAN BORGARO, Jr., and the said ANTONIO VALENZUELA, *alias* CHITO VALENZUELA, carried and transported from the said store of the said ESTEBAN BORGARO, Jr., to a point outside of the city of Tucson, Arizona, twenty-five of the said 30–30 caliber rifles, which they caused to be secreted.

OVERT ACT VI.

And the Grand Jurors aforesaid, on their oath aforesaid, do further present:

That, in furtherance of said conspiracy, and to effect the object [3] and purpose thereof, the said JOSE GANDARA on or about the 9th day of June, A. D. 1927, at Tucson, in the State and District aforesaid, and within the jurisdiction of this Court, did transport and carry certain ammunition and cartridges, the exact number and description of which are to the Grand Jurors unknown, to a point

outside the city of Tucson, Arizona, the exact location of which is to the Grand Jurors unknown, where same were secreted and stored at his direction.

OVERT ACT VII.

And the Grand Jurors aforesaid, on their oath aforesaid, do further present:

That in furtherance of said conspiracy, and to effect the object and purpose thereof, the said JOSE GANDARA, on or about the 1st day of June, A. D. 1927, at Tucson, in the State and District aforesaid, and within the jurisdiction of this Court, did furnish, give and turn over to the said ANTONIO VALENZUELA, *alias* CHITO VALENZUELA, certain money with which to pay for the said above described 30–30 caliber Winchester rifles and did instruct said ANTONIO VALENZUELA, *alias* CHITO VALENZUELA to pay for said rifles and to deliver same to a point outside of Tucson, Arizona.

OVERT ACT VIII.

And the Grand Jurors aforesaid, on their oath aforesaid, do further present:

That, in furtherance of said conspiracy, and to effect the object and purpose thereof, the said JOSE GANDARA, did between the dates of May 1, and June 20, A. D. 1927, at Tucson, in the State and District aforesaid, and within the jurisdiction of this Court, deliver and caused to be delivered at a certain point outside the city of Tucson, the exact location of which is to the Grand Jurors unknown, divers other rifles, to wit: seven 30–30 Winchester

carbines, Model 1894 rifles; six long barrelled Mauser 7 m. m. rifles; 7 carbine Mauser 7 m. m. rifles; five 30–30 caliber Winchester octagon barrelled rifles and approximately four other rifles, the exact description of which is to the Grand Jurors unknown.

OVERT ACT IX.

And the Grand Jurors aforesaid, on their oath aforesaid, do further present: [4]

That, in furtherance of said conspiracy, and to effect the object and purpose thereof, the said JOSE GANDARA, on or about the 17th day of June, A. D. 1927, at Tucson, within the State and District aforesaid, and within the jurisdiction of this Court, did procure and cause to be procured certain munitions of war, to wit, certain rifle cartridges of 30–30 caliber of 30–40 caliber and of 7 m. m. caliber, the exact number and description of which is to the Grand Jurors unknown, together with certain provisions and did furnish same to certain Yaqui Indians.

OVERT ACT X.

And the Grand Jurors aforesaid, on their oath aforesaid, do further present:

That, in furtherance of said conspiracy, and to effect the object and purpose thereof, the said JOSE GANDARA, between May 1, and June 20, A. D. 1927, the exact date being to the Grand Jurors unknown, at a certain point near Tucson, within said District of Arizona, did *arrange plan* with divers persons whose names are to the Grand Jurors unknown for the organization of certain

Yaqui Indians into an armed body and did then and there organize said Yaqui Indians into an armed body for the purpose of marching from the State of Arizona, within the United States of America, to the Republic of Mexico, with the intent then and there to make war upon the Government of the said Republic of Mexico, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

CLARENCE V. PERRIN,
Assistant United States Attorney for the District of Arizona. [5]

Witnesses examined before Grand Jury:

John K. Wren.	Francisco Felix.
C. M. Orosco.	G. V. Hays.
W. E. Jones.	C. S. Farrar.
Antonio Molino.	A. T. Spence.

A true bill.

M. H. MANSFIELD,
Foreman.

Filed in open court this 9th day of September, A. D. 1927. C. R. McFall, Clerk. [6]

[Title of Court and Cause.]

Honorable WILLIAM H. SAWTELLE, United States District Judge, Presiding.

MINUTES OF COURT—NOVEMBER 10, 1927—ORDER SETTING CASE FOR TRIAL.

John B. Wright, Esq., United States Attorney, and C. V. Perrin, Esq., Assistant United States Attorney, appear for the Government, and James D. Barry, Esq., Geo. O. Hilzinger, Esq., and T. K. Richey, Esq., appear as counsel for the defendants in this case. It is by the Court ordered that this case be and it is set for arraignment, plea and trial on November 22, 1927, at 9:30 o'clock A. M. [7]

[Title of Court and Cause.]

MINUTES OF COURT—NOVEMBER 22, 1927—TRIAL.

This case comes on regularly for trial this day. John B. Wright, Esq., United States Attorney, and C. V. Perrin, Esq., Assistant United States Attorney, appear as counsel for plaintiff. The defendant, Jose Gandara, is present in person, with his counsel, James D. Barry, Esq., and W. H. Fryer, Esq. The defendant, Esteban Borgaro, Jr., is present in person, with his counsel, T. K. Richey, Esq., and G. O. Hilzinger, Esq. The defendant, Juan Navarette, indicted as Bishop Navarette, is present in person, with his counsel, Messrs. James D. Barry, Frank E. Curley and Samuel L. Pattee.

Whereupon, each and all of said defendants waive arraignment and each of said defendants pleads not guilty, which pleas are now duly entered. The defendant indicted as Bishop Navarette, states that his true name is Juan Navarette, and it is thereupon by the Court ordered that further proceedings in this case as to the said defendant be had under his true name. All parties announce ready for trial.

Gertrude Mason is duly sworn to act as a Court reporter. A lawful jury of twelve men is thereupon duly empaneled and sworn to try this case. C. V. Perrin, Esq., Assistant United States Attorney, reads aloud the indictment to the jury and states the plea of not guilty of each defendant to the jury.

The defendants invoke the rule and the following witnesses are duly sworn and being duly admonished by the Court are excluded from the courtroom, to wit:

John K. Wren,	W. L. Conger,
B. F. Holliday,	C. M. Orosco,
W. E. Jones,	Lee Caldwell,
Dallas Ford,	Fred Ryan,
C. S. Farrar,	J. Curry,
Phillip G. Raymond,	A. R. Murchison,
P. D. Thornton,	Gabriel Miranda.

The following witnesses are duly sworn through a duly sworn Spanish Interpreter and being duly admonished by the Court are excluded from the courtroom, to wit:

Antonio Molino,	Jacinto Felix,
Francisco Felix,	Jesus Rivera,
Juan Alvarez,	Juana Mendoza,

Christiano Armento,	Faustina Olivas,
Jose Esteban Rivera,	Jose Juan Sanchez,
Antonio Coupez, *alias* Alvarez,	Matilde de Baltazar,
Francisco Valenzuela,	Jesus Valenzuela.

GOVERNMENT'S CASE.

The following witnesses, heretofore duly sworn, are called and examined as follows: John K. Wren, and after examination, is excepted from the rule; Antonio Molino and Francisco Felix.

And thereupon the further trial of this case is ORDERED continued to 9:30 o'clock A. M. on November 23, 1927, to which time, the jury, being first duly admonished by the Court, the parties and counsel are excused. [8]

[Title of Court and Cause.]

MINUTES OF COURT—NOVEMBER 23, 1927—TRIAL (CONTINUED).

The jury and all members thereof, the defendants, and all counsel, are present pursuant to recess, and further proceedings of trial are had as follows:

GOVERNMENT'S CASE (Continued).

The examination of witness, Francisco Felix, is resumed and concluded. Guadalupe Flores is now duly sworn and examined through a sworn inter-

preter. The following witnesses, heretofore sworn, are now called and examined, to wit:

W. L. Conger.	B. F. Halliday.
C. M. Orosco.	W. E. Jones.

John J. Farrell is now duly sworn and examined. Fred Ryan, heretofore sworn, is now called and examined. A. E. Brown is now duly sworn and examined as a witness.

Plaintiff's Exhibits, "A," "L," "M," "N," and "O" (all being documentary evidence), and "F," "G," "H," "I," "J," and "K" (being a lot of guns, ammunition, etc.) are now admitted in evidence.

And thereupon the further trial of this case is ORDERED continued to 9:30 A. M., November 25, 1927, to which time the jury, being first admonished by the Court, the parties and counsel are excused. [9]

[Title of Court and Cause.]

MINUTES OF COURT—NOVEMBER 25, 1927—TRIAL (CONTINUED).

C. V. Perrin, Esq., Assistant United States Attorney, appears as counsel for the United States, and the jury, and all members thereof, the defendants and all counsel, are present pursuant to recess, and further proceedings of trial are had as follows:

GOVERNMENT'S CASE (Continued).

The following Government witnesses, heretofore sworn, are called and examined, to wit:

C. S. Farrar,

Joe Curry,

Jose Esteban Rivera, through duly sworn interpreter.

Jesus Rivera, through duly sworn interpreter.

Faustina Olivas, through duly sworn interpreter.

Jose Juan Sanchez, through duly sworn interpreter.

Jacinta Felix, through duly sworn interpreter.

G. V. Hayes is now called, sworn and examined as a witness for the Government, and John K. Wren is recalled for further examination on behalf of the Government.

Whereupon, it is by the Court ordered that the jury in this case be, and they are, excused until Tuesday, November 29, 1927, at 9:30 o'clock A. M., and IT IS FURTHER ORDERED that detained witnesses herein, to wit: Francisco Valenzuela and Jesus Valenzuela and Antonio Kupez, be discharged from custody and paid the lawful fees for the period of their detention.

Whereupon, the further trial of this case is ORDERED continued to 9:30 o'clock A. M., on November 26, 1927, to which time the parties and all counsel are excused. [10]

[Title of Court and Cause.]

MINUTES OF COURT—NOVEMBER 26, 1927—TRIAL (CONTINUED).

C. V. Perrin, Esq., Assistant United States Attorney, and Carl R. Tisor, Esq., Assistant United States Attorney, appear as counsel for the Government. The defendants and all counsel are present pursuant to recess and further proceedings of trial are had in the absence of the jury, as follows:

Each and all of the defendants, Jose Gandara, Esteban Borgaro, Jr., and Juan Navarette, move the Court to direct a verdict of not guilty, as to each and all of the defendants.

The said motions are argued by respective counsel and by the Court taken under advisement, and the further trial of this case is ORDERED continued to 9:30 o'clock A. M. on November 29, 1927, to which time the parties and counsel are excused. [11]

[Title of Court and Cause.]

MINUTES OF COURT—NOVEMBER 29, 1927—TRIAL (CONTINUED).

C. V. Perrin, Esq., Assistant United States Attorney, appears as counsel for the Government. The jury and all members thereof, the defendants and all counsel are present pursuant to recess, and further proceedings of trial are had as follows:

GOVERNMENT'S CASE (Continued).

The examination of John K. Wren is resumed and concluded, and

The Government rests.

The defendants each and all renew their motions for a directed verdict of not guilty. Whereupon, it is by the Court ordered that said motion of the defendant, Juan Navarette, be, and the same is, sustained; that the motion of the defendant, Jose Gandara, be, and it is, overruled, to which ruling the said defendant excepts; that the motion of the defendant, Esteban Borgaro, Jr., be and it is overruled, to which ruling the said defendant excepts.

CASE OF DEFENDANTS JOSE GANDARA AND ESTEBAN BORGARO, JR.

The defendant, Jose F. Gandara, is sworn and examined, and the defendant, Esteban Borgaro, Jr., is sworn and examined, and the said defendants rest.

REBUTTAL.

John J. Farrell, heretofore sworn, is recalled for further examination. And

The Government rests.

The defendants rest.

The defendants, Jose F. Gandara and Esteban Borgaro, Jr., each renew their motions for a directed verdict of not guilty, which said motions are overruled, to which ruling each of said defendants excepts.

And thereupon the further trial of this case is ORDERED continued to 9:30 A. M. on November 30, 1927, to which time, the jury, being first duly admonished by the Court, the parties and counsel are excused.

[Title of Court and Cause.]

MINUTES OF COURT—NOVEMBER 30, 1927—TRIAL (CONTINUED).

C. V. Perrin, Esq., Assistant United States Attorney, appears as counsel for the Government. The jury and all members thereof, the defendant and all counsel are present pursuant to recess, and further proceedings of trial are had as follows:

GOVERNMENT'S CASE (Continued).

The examination of John K. Wren is resumed and concluded, and

The Government rests.

REBUTTAL.

John J. Farrell, heretofore sworn, is recalled for further examination. And

The Government rests.

The defendants rest.

The defendants, Jose F. Gandara and Esteban Borgaro, Jr., each renew their motions for a directed verdict of not guilty, which said motions are overruled, to which ruling each of said defendants excepts.

And thereupon the further trial of this case is ORDERED continued to 9:30 A. M. on November 30, 1927, to which time, the jury, being first duly admonished by the Court, the parties and counsel are excused. [12]

[Title of Court and Cause.]

MINUTES OF COURT—NOVEMBER 30, 1927—TRIAL (CONTINUED).

C. V. Perrin, Esq., Assistant United States Attorney, appears as counsel for the United States. The jury and all members thereof, the defendants, Jose Gandara and Esteban Borgaro, Jr., and all counsel are present pursuant to recess, and further proceedings of trial are had as follows:

All evidence being in, the case is argued by respective counsel to the jury, and for the Court duly instructs the jury, and said jury retire in charge of their bailiffs, officers of this Court first duly sworn for that purpose, to consider of their verdict.

It is by the Court ordered that the marshal provide meals and lodging for the jury and bailiffs at the expense of the United States, until such time as they are discharged in this case. [13]

[Title of Court and Cause.]

MINUTES OF COURT—DECEMBER 1, 1927—TRIAL (CONTINUED).

C. V. Perrin, Esq., Assistant United States Attorney, appears as counsel for the United States. The defendants, Jose Gandara and Esteban Borgaro, Jr., and all counsel aforesaid, are present pursuant to recess and further proceedings of trial are had as follows:

At 10:30 o'clock A. M., the jury return into court, all members present, and pursuant to the Court's instructions, return the following verdict as to the defendant, Juan Navarette:

C.—3446.

"UNITED STATES OF AMERICA,

Plaintiff,

Against

JUAN NAVARETTE, Indicted as BISHOP NAVARETTE,

Defendant.

VERDICT.

We, the Jury, duly empaneled and sworn in the above-entitled action, upon our oaths, do find the defendant NOT GUILTY.

CHARLES M. McKEAN,

Foreman."

And through their foreman report they have agreed upon a verdict as to defendant, Jose Gandara, and present the following verdict, to wit:

C.—3446.

"UNITED STATES OF AMERICA,

Plaintiff,

Against

JOSE GANDARA,

Defendant.

VERDICT.

We, the Jury, duly empaneled and sworn in the above-entitled action, upon our oaths, do find the defendant GUILTY in manner and form as charged in the indictment.

CHARLES M. McKEAN,

Foreman."

And further report that they have been unable to agree upon a verdict as to the defendant, Esteban Borgaro, Jr.

The above verdicts are read and recorded, and the defendant, Jose Gandara, is by the Court ordered committed to the county jail of Pima County, Arizona, to await sentence, and it is FURTHER ORDERED that the defendant, Juan Navarette be discharged to go hence without day, and

IT IS FURTHER ORDERED that the jury shall further deliberate as to the defendant, Esteban Borgaro, Jr.

At 2:00 o'clock P. M., the defendant, Esteban Borgaro, Jr., and his counsel aforesaid being pres-

ent, and C. V. Perrin, Esq., Assistant United States Attorney, appearing for the United States, the jury return into court and upon the request of the jury, counsel for the United States consenting, and counsel for the defendant, Esteban Borgaro, Jr., also consenting thereto, it is by the Court ordered that the marshal take the jury to view certain premises in question in this case, and thereafter, that the jury return to their room in charge of their bailiff to resume deliberation as to said defendant's case.

Subsequently, at 5:15 o'clock P. M., the defendant, Esteban Borgaro, Jr., and his counsel being present, the jury return into court and [14] report they are unable to agree upon a verdict.

It is thereupon by the Court ordered that the said jury be discharged from the further consideration of this case and a mistrial entered as to said defendant, Esteban Borgaro, Jr., said defendant to go on his present bond until the further order of the Court.

It is FURTHER ORDERED that the United States marshal take and safely keep and store in a convenient place, all arms, ammunition, etc., seized in this case and introduced in evidence, until the further order of the Court. [15]

[Title of Court and Cause.]

MINUTES OF COURT—DECEMBER 2, 1927—JUDGMENT.

C. V. Perrin, Esq., Assistant United States Attorney, appears for the Government. The defendant,

Jose Gandara, is present in person with his counsel, Messrs. W. H. Fryer and James D. Barry, and is now duly informed by the Court of the nature of the crime charged in the Indictment herein, to wit: Unlawfully and feloniously and corruptly conspiring, combining, confederating and agreeing together with divers other persons whose names are unknown, to commit an offense against the United States of America, to wit: the offense of unlawfully and feloniously beginning, setting on foot and providing and preparing the means for a military enterprise against the Republic of Mexico; and furnishing of arms, munitions, supplies and money for the carrying on and supporting of armed rebellion in the said Republic of Mexico, of the citizens of said Republic against the government and authority there, committed between the first day of May, 1927, and the 20th day of June, 1927, in violation of Section 37 of the Federal Penal Code of 1910; and in conspiracy to violate Section 13 of the Federal Penal Code; of his arraignment on said charge and of his plea of not guilty thereto, and of his trial and conviction thereof by jury.

And no legal cause appearing why judgment should not now be imposed, the Court renders judgment as follows:

That the said defendant having been duly convicted of said crime, the Court now finds him guilty thereof, and as a punishment therefor, does now

ORDER, ADJUDGE AND DECREE that said defendant, Jose Gandara, be imprisoned in the United States Penitentiary at McNeil Island,

Washington, for the period of two years, to date from the date of his delivery to the warden of the said penitentiary; and fined the sum of One Thousand Dollars ($1,000.00), and that he stand committed to the said penitentiary until the said fine is paid or he is otherwise discharged by law, said commitment in default of the payment of said fine [16] to date from the expiration of the prison sentences herein imposed upon said defendant.

Upon request of said defendant, IT IS FURTHER ORDERED that said defendant be detained in the county jail of Pima County, Arizona, until the said defendant can give bail upon a writ of error, or until the further order of the Court. [17]

[Title of Court and Cause.]

MINUTES OF COURT—DECEMBER 3, 1927—EXAMINATION OF BOND.

On motion of James D. Barry, Esq., counsel for the defendant, Jose F. Gandara, it is by the Court ordered that the bond of Jose F. Gandara, for appearance for trial before this Court, in this case, executed August 5, 1927, in the sum of Five Thousand Dollars ($5,000.00), with J. C. Etchels and Leonardo Moreno as sureties, be and the same is hereby exonerated and discharged. [18]

[Title of Court and Cause.]

MINUTES OF COURT—DECEMBER 3, 1927—ORDER ALLOWING PETITION FOR WRIT OF ERROR.

It is by the Court ordered that the petition of the defendant, Jose Gandara, for a writ of error to the Circuit Court of Appeals for the Ninth Circuit be, and the same is hereby allowed. [19]

[Title of Court and Cause.]

MINUTES OF COURT—DECEMBER 10, 1927—ORDER APPROVING AND ACCEPTING BOND.

It appearing to the Court that the defendant, Jose Gandara, has tendered bond for costs on writ of error in this case to the Circuit Court of Appeals for the Ninth Circuit, in the sum of Two Hundred and Fifty Dollars ($250.00), it is by the Court ordered that the said bond be and the same is approved and accepted. [20]

[Title of Court and Cause.]

MINUTES OF COURT—DECEMBER 10, 1927—ORDER ACCEPTING BOND FOR APPEARANCE AND RELEASING DEFENDANT FROM CUSTODY.

The defendant, Jose Gandara, now tenders his

bond for appearance and for the payment of the fine imposed by the judgment herein pursuant to the Writ of error allowed and issued in this cause, said bond being executed on the 9th day of December, A. D. 1927, with the Union Indemnity Company, a corporation of New Orleans, Louisiana, as surety thereon in the sum of Ten Thousand Dollars ($10,000.00) and the Court having examined same, does now ORDER that the said bond be and it is hereby accepted and approved and it is

FURTHER ORDERED that the defendant aforesaid be released from custody upon said bond. [21]

[Title of Court and Cause.]

MINUTES OF COURT—DECEMBER 16, 1927—ORDER EXTENDING TIME TO AND INCLUDING JANUARY 14, 1928, TO FILE BILL OF EXCEPTIONS.

It appearing by the stipulation attached hereto, dated December 16, 1927, signed by the attorneys for the respective parties, that the consent of the plaintiff has been obtained for the entrance of this order,—

IT IS HEREBY ORDERED that the time in which the defendant may file his bill of exceptions in the above-entitled cause is extended to and including the 14th day of January, 1928.

Dated Tucson, Arizona, December 16, 1927.

WM. H. SAWTELLE,
United States District Judge. [22]

[Title of Court and Cause.]

MINUTES OF COURT—JANUARY 14, 1928—ORDER EXTENDING TIME TO AND INCLUDING FEBRUARY 13, 1928, TO FILE BILL OF EXCEPTIONS.

It appearing by the stipulation attached hereto, dated January 14, 1928, signed by the attorneys for the respective parties, that the consent of the plaintiff has been obtained for the entrance of this order,—

IT IS HEREBY ORDERED that the time in which the defendant may file his bill of exceptions in the above-entitled cause is extended to and including the 13th day of February, 1928.

Dated Tucson, Arizona, January 14, 1928.

WM. H. SAWTELLE,
United States District Judge. [23]

[Title of Court and Cause.]

MINUTES OF COURT—FEBRUARY 11, 1928—ORDER EXTENDING TIME THIRTY DAYS TO PREPARE, TENDER AND SETTLE BILL OF EXCEPTIONS.

For good cause shown, it is ordered that the defendant Jose Gandara be and he is hereby allowed thirty days additional to the time heretofore allowed within which to prepare, tender and settle his bill of exceptions herein. [24]

[Title of Court and Cause.]

MINUTES OF COURT—FEBRUARY 28, 1928—ORDER OF DISMISSAL.

On motion of Carl R. Tisor, Esquire, Assistant United States Attorney, it is by the Court ordered that this case be and it hereby is dismissed as to the defendants Esteban Borgaro, Jr., and Antonio Valenzuela, *alias* Chito Valenzuela, and said defendants' bonds exonerated. [25]

[Title of Court and Cause.]

MINUTES OF COURT—MARCH 12, 1928—ORDER EXTENDING TIME THIRTY DAYS TO PROPOSE AMENDMENTS TO BILL OF EXCEPTIONS.

On motion of C. V. Perrin, Esquire, Assistant United States Attorney, it is by the Court ordered that the plaintiff herein be allowed thirty days from this date within which to propose amendments to the defendant's proposed bill of exceptions herein. [26]

[Title of Court and Cause.]

MINUTES OF COURT—APRIL 9, 1928—ORDER EXTENDING TIME THIRTY DAYS TO PROPOSE AMENDMENTS TO BILL OF EXCEPTIONS.

On motion of C. V. Perrin, Esquire, Assistant United States Attorney, it is by the Court ordered

that the plaintiff herein be and is hereby allowed thirty days in addition to the time heretofore allowed in which to propose amendments to the bill of exceptions herein; and it is further ordered that the time within which said bill may be settled be and it is extended for said period. [27]

[Title of Court and Cause.]

PETITION FOR WRIT OF ERROR.

To the Honorable District Court:

Now comes Jose Gandara, the defendant herein, by his attorneys, James D. Barry and W. H. Fryer, and says that on the 1st day of December, A. D. 1927, during the regular term of said court, he was convicted, a verdict of guilty being rendered against him in the above styled and numbered cause, and a judgment was rendered thereon on the 2d day of December, A. D. 1927, on which date sentence was pronounced against him, as appears of record, and that in the said judgment and in the proceedings had prior thereto, upon the trial of this cause, errors were committed, to the prejudice of this defendant, all of which will more fully appear from the assignment of errors filed with this petition.

WHEREFORE, said defendant, Jose Gandara, respectfully prays that a writ of error be allowed in this behalf out of the Honorable United States Circuit Court of Appeals for the Ninth Circuit, for the correction and revision of the errors so complained of, and that a transcript of the record of

proceedings and papers in this cause, duly authenticated, be sent to the Honorable the Circuit Court of Appeals for the Ninth Circuit, for the correction and revision of said errors, and that upon the hearing of this cause before the said Circuit Court of Appeals it be reversed, as to the defendant Jose Gandara, and that such other and further orders, judgments, and [28] decrees be made and entered therein as shall be deemed just in the premises.

Respectfully submited,
JOSE GANDARA,
Said Defendant.
JAMES D. BARRY,
W. H. FRYER,
Attorneys for Said Defendant.

Writ of error allowed upon the foregoing petition this 3 day of December, A. D. 1927.

WM. H. SAWTELLE,
U. S. District Judge.

[Indorsements]: Filed Dec. 3, 1927. [29]

[Title of Court and Cause.]

ASSIGNMENTS OF ERROR.

The above-named defendant, Jose Gandara, by his attorneys, in connection with his petition for writ of error, makes the following assignments of error, which he alleges occurred in the trial of said cause:

1. Because the Court erred in overruling the

defendant's exception to the Court's charge for its failure to charge the jury upon the defendant's theory of defense that if a military enterprise or expedition had been begun or set on foot in Mexico, and the acts alleged to have been done by the defendant were done in a conspiracy in connection with such an expedition, then he should be acquitted.

2. Because the Court erred in refusing to give to the jury defendant's special requested instruction No. 1, submitting defendant's theory of defense to the effect that if the jury believed that a military expedition had been already begun or set on foot in Mexico and the members thereof had come to the United States for ammunition and supplies with the purpose and intention to return to Mexico, and that the defendant conspired to furnish arms and ammunition to such expedition, he would not be guilty of an offense under the charge as laid in the indictment, said requested instruction reading as follows

"Gentlemen of the Jury:

"The jury are instructed, if prior to the commission of any of the acts charged in the indictment, a revolution or revolt of the Yaqui Indians was in existence in the Republic of Mexico in which armed forces of the said Indians were in conflict with the military [30] forces of the Mexican government, and if members of such armed forces of the Yaqui Indians came to the United States for the purpose of securing munitions of war and provisions, and then returning to rejoin the forces of such Indians

in Mexico, and the defendant Gandara furnished ammunition or provisions only for such Indians as had come from Mexico, and intended to return to Mexico, and not to recruit or secure other Indians to go to Mexico, then such furnishing of ammunition and provisions would not constitute either a military enterprise or a military expedition as those terms are used in the statute of the United States on which this prosecution is based, and the defendant, Gandara, would not be guilty of beginning, setting on foot, or furnishing means for any military expedition or military enterprise, and a conspiracy merely to furnish ammunition and provisions to Yaqui Indians who had come from Mexico and were intending to return to Mexico under the circumstances above mentioned, would not be an offense against the United States."

Which special requested instruction was refused by the Court, to which action the defendant then and there excepted, and said requested instruction was marked refused and ordered filed.

WHEREFORE, defendant prays that on account of said errors he have a reversal of the Judgment of the Court.

JAMES D. BARRY,
W. H. FRYER,
Attorneys for Defendant.

[Indorsements]: Filed Dec. 3, 1927. [31]

ORDER FIXING AMOUNT OF BAIL BOND AND BOND FOR THE PAYMENT OF THE FINE ASSESSED BY THE COURT.

It appearing to the Court that a writ of error has been sued out in this case by the defendant, Jose Gandara, returnable to the United States Circuit Court of Appeals for the Ninth Circuit, from the judgment made and entered by this Court on the 2d day of December, A. D. 1927;

And it appearing that the United States Attorney has no objection, it is therefore ordered and decreed that the defendant, Jose Gandara, be admitted to bail pending said writ of error; that the said defendant, Jose Gandara, be so admitted to bail in the sum of Ten Thousand Dollars ($10,000.00), conditioned as required by law and the rules and orders of this Court; and that upon the filing of said bond, which shall contain a provision for the payment of the fine assessed against the defendant if the judgment of this Court is affirmed, stay of execution is hereby granted pending the determination of this said writ of error, said bond to be approved by this Court.

Done in open court this 3d day of December, 1927.

WM. H. SAWTELLE,
United States District Judge.

[Indorsements]: Filed Dec. 3, 1927. [32]

[Title of Court and Cause.]

Hon. WILLIAM H. SAWTELLE, Judge.

ORDER FIXING AMOUNT OF COST BOND.

It is ordered by the Court that the cost bond in this cause to be executed by and on behalf of the defendant, Jose Gandara, be and the same is hereby fixed at the sum of Two Hundred and Fifty Dollars.

WM. H. SAWTELLE,
United States District Judge.

[Indorsements]: Filed Dec. 3, 1927. [33]

COST BOND.

KNOW ALL MEN BY THESE PRESENTS: That we, Jose Gandara, as principal, and Union Indemnity Company, a corporation organized and existing under the laws of the State of Louisiana, and having its principal office at New Orleans, La., as surety, are held and firmly bound unto the United States of America in the full and just sum of Two Hundred Fifty Dollars ($250.00), to be paid to the United States of America, to which payment well and truly to be made we and each of us bind ourselves, our successors, heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals, and dated this 9th day of December, in the year of our Lord, one thousand nine hundred and twenty-seven.

WHEREAS, at the regular November Term, 1927, of the United States District Court for the District of Arizona, sitting at Tucson, Arizona, in a cause pending in the said court, wherein the United States of America was plaintiff and Jose Gandara was defendant, and numbered C.—3446 on the criminal docket of said Court a verdict of guilty was rendered against the said Jose Gandara and judgment and sentence were pronounced thereon on the 2d day of December, A. D. 1927, and the said Jose Gandara has obtained a writ of error allowed in open court to the United States Circuit Court of Appeals for the Ninth Circuit, for the revision of alleged errors and to reverse the judgment in said cause, and has filed his application for writ of error and assignment of errors in the office of the Clerk of said court to reverse the judgment in the above styled and numbered cause, and has procured the issuance of a citation directed to the United States of America, citing and admonishing them to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit to be holden at San Francisco, California, within thirty days from the date thereof.

NOW, THEREFORE, the condition of the above obligation is such that if the said Jose Gandara shall prosecute said writ of error to [34] effect and answer all damages and costs if he may fail to make this plea good, then the above obligation to be void; else to remain in full force and effect.

JOSE GANDARA, (Seal)
Principal.

UNION INDEMNITY COMPANY, a Corporation. (Seal)
By FRANK A. PEYTON, (Seal)
Its Attorney-in-fact.

Witness:
JAMES D. BARRY.

Approved this 10 day of December A. D., 1927.
WM. H. SAWTELLE,
United States District Judge.

[Indorsements]: Filed Dec. 10, 1927. [35]

BOND FOR APPEARANCE.

KNOW ALL MEN BY THESE PRESENTS: That we, Jose Gandara, as principal, and Union Indemnity Company, a corporation organized and existing under the laws of the State of Louisiana, and *and* having its principal office at New Orleans, La., as surety, are held and firmly bound unto the United States of America in the full and just sum of Ten Thousand ($10,000.00) Dollars, to be paid to the United States of America, to which payment well and truly to be made, we bind ourselves, our heirs, executors, administrators and successors, jointly and severally by these presents.

Sealed with our seals and dated this 9th day of December, in the year of our Lord, one thousand nine hundred and twenty-seven.

WHEREAS, lately at the November Term, A. D. 1927, of the District Court of the United States for the District of Arizona, in a suit pending in said

court, between the United States of America, plaintiff, and Jose Gandara, defendant, a judgment and sentence was rendered against the said Jose Gandara and the said Jose Gandara has obtained a writ of error from the United States Circuit Court of Appeals for the Ninth Circuit to reverse the judgment and sentence in the aforesaid suit and a citation directed to the said United States of America, citing and admonishing the United States of America to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, at the city of San Francisco, California, thirty days from and after the date of said citation, which citation has been duly served.

NOW, the condition of the above obligation is such that if the said Jose Gandara shall appear in person or by attorney in the United States Circuit Court of Appeals for the Ninth Circuit, on such day or days as may be appointed for the hearing of said cause in said Court and prosecute his writ of error, and shall abide by and obey all orders made by the said United States Circuit Court of Appeals for the Ninth Circuit, in said cause, and shall surrender himself in execution of the judgment and sentence appealed from as said Court may direct, if the judgment and sentence against him shall be affirmed or the writ of error [36] or appeal is dismissed, and further, if said judgment and sentence against him shall be affirmed or the writ of error or appeal is dismissed, he shall pay in full the fine of One Thousand Dollars ($1,000.00) assessed against him; and if he shall appear for trial in the

United States Court for the District of Arizona, at Tucson, Arizona, on such day or days as may be appointed for a retrial by said District Court, and abide by and obey all orders made by said Court, provided the judgment and sentence against him shall be reversed by the United States Circuit Court of Appeals for the Ninth Circuit, then the above obligation to be void, else to remain in full force, virtue and effect.

JOSE GANDARA, (Seal)
UNION INDEMNITY COMPANY, a Corporation. (Seal)
By FRANK A. PEYTON, (Seal)
Its Attorney-in-fact.

Witness:
JAMES D. BARRY.

Approved: Dec. 10, 1927.
WM. H. SAWTELLE,
Judge of the United States District Court for the District of Arizona.

[Indorsements]: Filed Dec. 10, 1927. [37]

[Title of Court and Cause.]

STIPULATION EXTENDING TIME TO AND INCLUDING JANUARY 14, 1928, TO FILE BILL OF EXCEPTIONS.

It is hereby stipulated and agreed that the defendant's time in which to file his proposed bill of exceptions in the above-entitled cause be, and the

same hereby is, extended to and including the 14th day of January, 1928.

It is further stipulated and agreed that an order to this effect may be entered herein without further notice to the parties and that defendant have the same right to file said bill of exceptions within the time stated with the same force and effect as though said matter had been done and performed heretofore.

Dated December 16, 1927.

CLARENCE V. PERRIN,
Assistant United States District Attorney.
JAMES D. BARRY,
W. H. FRYER,
Attorneys for Defendant.

[Indorsements]: Filed Dec. 16, 1927. [38]

[Title of Court and Cause.]

STIPULATION EXTENDING TIME TO AND INCLUDING FEBRUARY 13, 1928, TO FILE BILL OF EXCEPTIONS.

It is hereby stipulated and agreed that the defendant's time in which to file his proposed bill of exceptions in the above entitled cause be, and the same hereby is, extended to and including the 13th day of February, 1928.

It is further stipulated and agreed that an order to this effect may be entered herein without further notice to the parties and that defendant have the same right to file said bill of exceptions within

the time stated with the same force and effect as though said matter had been done and performed heretofore.

Dated January 14, 1928.

_____,
United States District Attorney.
JAMES D. BARRY,
W. H. FRYER,
Attorneys for Defendant.

[Indorsements]: Filed Jan. 14, 1928. [39]

[Title of Court and Cause.]

DEFENDANT'S REQUESTED INSTRUCTION TO THE JURY No. 1.

(1) The jury are instructed, if prior to the commission of any of the acts charged in the indictment, a revolution or revolt of the Yaqui Indians was in existence in the Republic of Mexico in which armed forces of the said Indians were in conflict with the military forces of the Mexican Government, and if members of such armed forces of the Yaqui Indians came to the United States for the purpose of securing munitions of war and provisions, and then returning to rejoin the forces of such Indians in Mexico, and the defendant Gandara furnished ammunition or provisions only for such Indians as had come from Mexico, and intended to return to Mexico, and not to recruit or secure other Indians to go to Mexico, then such furnishings of ammunition and provisions would not constitute

either a military enterprise or a military expedition as those terms are used in the statute of the United States on which this prosecution is based, and the defendant Gandara would not be guilty of beginning, setting on foot, or furnishing means for any military expedition or military enterprise, and a conspiracy merely to furnish ammunition and provisions to Yaqui Indians who had come from Mexico and were intending to return to Mexico under the circumstances above mentioned, would not be an offense against the United States.

[Indorsements]: Filed Nov. 30, 1927. [40]

[Title of Court and Cause.]

BILL OF EXCEPTIONS.

BE IT REMEMBERED that on the 22d day of November, 1927, at a regular and stated term of the United States Court for the District of Arizona, before the Honorable William H. Sawtelle, Judge of the above-entitled court, the issues joined in said cause came on to be tried by said Judge and a jury impanelled and sworn to try the issues in said cause.

The Government was represented by John B. Wright, United States Attorney, and Clarence V. Perrin, Assistant United States Attorney, and the defendant, being present in person, was represented by W. H. Fryer and James D. Barry, his attorneys.

The indictment being read to the jury by counsel for the Government and a plea of not guilty thereto having previously been entered by the defendant,

thereupon the following further proceedings were had herein, to wit:

TESTIMONY OF JOHN K. WRENN, FOR THE GOVERNMENT.

JOHN K. WRENN was called by and as a witness for and on behalf of the Government and was first duly sworn and testified substantially as follows:

Direct Examination.

My name is John K. Wrenn, and I am a special agent of the Department of Justice, and have been so engaged about ten years, and was engaged in that capacity during the months of May and June of this year. [41—1]

I know Esteban Borgaro and Jose Gandara, but I do not know Juan Navarette. I have been acquainted with Borgaro since about June 9th, when I met him at his store on Meyer Street, this city. Before June 9th, we had received information from the Los Angeles office of the Bureau of Investigation, and acting on that information I came from El Paso to Tucson and shortly after my arrival, I saw eight cases of guns down at the Southern Pacific Depot being unloaded from an express-car on to an express truck, and I inspected the cases and saw that they were guns, the same being marked "Winchester," and on top of the boxes was the San Francisco firm name, something like Hayden & Company. The boxes were addressed to this Company, and on the boxes was also, "Notify E. Borgaro, Jr., Tucson, Arizona."

(Testimony of John K. Wrenn.)

That was about between eight and ten o'clock in the morning when I saw the guns on the truck. At that time I had Mr. Caldwell, Border Patrol Inspector, with me and he assisted me, and before the cases were unloaded from the express-car, Mr. Borgara came up close by us and walked by the express-car. I didn't know his name at that time. I later identified him as the defendant here. Then he went away [42—2] and came back and was around the platform, and about that time the guns were put on the truck by the express employee and he started to the express office, and Mr. Borgaro walked by and stopped near the express truck. Then I knew I had to watch these particular guns and Mr. Caldwell and I were still together and we saw Mr. Borgaro go away and then, later, return in a car. His return was not very long after he had been there before—probably half an hour. He went away, came back and went into the express office, and then came out and went away. I went into the express office and talked to Mr. Orosco, one of the clerks there, and to Mr. Jones, the delivery man, who, I think, was the man that unloaded the rifles from the express-car on to the truck and took the cases of rifles to the express office or warehouse; later, Mr. Jones loaded the rifles on to the express wagon and left. He was driver for the Express Company. He left in his wagon and went down the street and then turned to the left and later, drove to a side door of Mr. Borgaro's store; I was there when he got there and I saw that. I was there

(Testimony of John K. Wrenn.)

when he drove up, and this driver, with the assistance of some of the men, delivered the eight cases of guns inside of the store. That's all I saw at that time—that the rifles were delivered to Mr. Borgaro's place of business, which is located on Broadway & Meyer Streets in Tucson—41 Meyer Street, I believe.

In the evening later, I talked to Mr. Borgaro about the rifles. I didn't see anything more of him until then. This was the first conversation I had with him regarding the guns, and he made a free and voluntary statement to me at that time. I left Mr. Borgaro's place in the morning, after delivery of the guns was made by the express driver. I saw eight cases of guns delivered to his store. I came back to the store later to look at the guns that were in his store, and all the cases were there, but several of them had been opened and the guns were not there. This was the same day the delivery was made. The empty cases that I saw at his store were some of the same cases that I had seen unloaded to the truck at the depot platform. The guns from these particular cases were gone—some of them were there [43—3] and some were gone. The empty wooden boxes were in the store, and I observed the mark on those boxes and identified them as being the same cases I had previously seen at the depot.

Acting on information I received, I went to Mr. Borgaro's store and part of the guns were gone, as I said before. I talked to Mr. Borgaro, and after

(Testimony of John K. Wrenn.)

that I found some of the guns had been taken away and I talked to Mr. Borgaro; I made efforts to locate the lost guns. I was with Mr. Caldwell and Mr. Farrell and Mr. Borgaro, and Mr. Borgaro took us to a place out by an arroyo, close to what is called Millville.

I went back to the store in the evening; that is, I got out and went in and when I went in I asked if Mr. Borgaro was there and they said, "No." There was a lady there who spoke and said that he had taken the children, or some young folks, to dinner. Well, I returned in the evening and Mr. Borgaro was there. I asked Mr. Borgaro if he had received the shipment of eight cases of guns, and he said, "Yes, sir." I said, "Where are the guns?" He says, "Why, they are all there in the cases," and we found part of the cases—some of the cases had been opened and the guns, part of the guns were gone. I said, "Mr. Borgaro, what became of the guns, the balance of these guns?" He says, "Well, some of them were sold here, sold them right here." I said, "Well, now, here is a man"—pointing to Mr. Farrell—"who saw you take, with another man, some of the guns away in a car," I said. Well, and then I said further, "All I want to know is what became of the guns, who received the guns, and if you turned them over to any persons who were not entitled to them," and after some parley he said, "Well, I delivered them to a house." I said, "Well, would you mind showing us the house?" and he said, "Well, all right," and we got into a car, Mr.

(Testimony of John K. Wrenn.)

Caldwell, Mr. Borgaro, Mr. Farrell and myself, and drove out, we will say, south of town, and after some short distance he said, "Well, I didn't deliver them to a house,—the guns—I took them out here some distance, across the tracks, near a place called Millville." And I said, "Of course you will take me to that place?" and he said he would and we got out in an arroyo, out, I will [44—4] say, in that direction (indicating) from Millville, and he says, "Here in this arroyo is where I delivered the guns with this other man." I asked him, "Do you know the other man? Do you know his name, the man who was with you at the time of delivery?" He said, "Well, I don't know him." I said, "Who did you deliver the guns to?" "I don't know; there was about eight or twelve men in the truck and I delivered them at this spot, at the arroyo here, along about—sometime before you came to the store." Well, before going out there, we talked the matter over with reference to the guns, how many he sold, and he said, "Well, out of that shipment I delivered to the parties"—he didn't know their names, he delivered twenty-five, thirty-five rifles out of this particular shipment; that four more guns belonging to him, that he had sold out of his store, to someone he did not know who; that some time previous to the date of this delivery a man came to his place, a Mexican—he didn't know his name—and told him that he wished to buy a number of guns, and that this man was with another man, and the party who ordered the guns and said

(Testimony of John K. Wrenn.)

he would take the guns up to seventy-five or a hundred, told him that he would take them if he could get them, and that the man who ordered the guns designated the man who was with him when he ordered the guns as the man to receive the guns when they were delivered by Mr. Borgaro or given to him by Mr. Borgaro; and some two days before the guns came from San Francisco, the place where he said he ordered them from the party or the agent, or man designated by the purchaser to receive the guns from Mr. Borgaro, came on several occasions and insisted on the immediate delivery of the guns; that when the guns came, or about on the same day that the guns came from Frisco,—the day that he delivered the twenty-five to the twelve men or eight men in the truck—previous to his delivery, that this agent of the purchaser had come, insisting upon the delivery of them. That this man's coming there and insisting on the delivery of the guns, he said that he became kind of uneasy about it and figured that probably there was something wrong and the guns might be for fighting purposes. He stated further, at one time, that he had his money tied up into the purchase of the [45—5] arms, that he had been to the Southern Arizona Bank & Trust Company and had made arrangements for the payment of these guns and that he had ordered the guns from a man by the name of Mr. Conger, who was said to be—whom he thought to be or was said to be an agent or salesman for the company from whom the guns were purchased; that the fellow, the

(Testimony of John K. Wrenn.)

agent of the purchaser of the guns, at that time he delivered, insisted upon delivery of them, that he had his money tied up into it to a certain extent by borrowing from the bank to pay for the guns, and the fellow insisted upon delivery outside of the store, and he thought, well, it was best to deliver them; that he did deliver them, the twenty-five guns, out of the shipment, and when he reached the spot, out at this place—the arroyo near Millville,—he realized then again, or further, that the guns were for revolutionary purposes.

Borgaro said he ordered the guns from a salesman, who I later learned was Mr. Conger, the salesman for this particular company in San Francisco. Borgaro said that he asked this salesman, "Well, what about the embargo on arms and ammunition?" and he said the salesman advised him that he didn't believe there was an embargo on ammunition; that he could sell these guns one or two at a time by delivery at the store, or delivering *bona fide* sales. As to whether he stated what embargo he meant, we discussed the situation in Mexico and the embargo on ammunition, and I told him that the embargo on ammunition was still in effect, and I inferred that he meant the same thing.

I had another conversation with Borgaro at his store on the same day, and Mr. Caldwell was present. Mr. Borgaro, during our conversation, said the party or parties purchasing the guns had said that they would take some twenty or twenty-five thousand rounds of 30–30 cartridges and presumed

(Testimony of John K. Wrenn.)
they would go with the guns, and that he had ordered, or had coming, twenty or twenty-three or four thousand rounds of 30–30 cartridges.

As I said before, the guns were gone when we got out to see the arroyo, so there was no guns there, and I could not see any signs where a delivery had been made—no signs of a truck or footprints [46—6] around in the sand there. Borgaro had stated to me the manner in which the guns had been delivered by him. He said that he put them in his car and that this party, whose name he did not know, went with him and they went out to the arroyo and when they reached there, the truck was in the arroyo and the parties got out of the truck, with the man who was in his car with him, and took the guns out of his car and put them into the truck, and that he went on and left the truck there and didn't see them any more.

I looked very closely out there, and I wanted to give Mr. Borgaro the best of it, and I couldn't find where there had been any tracks of persons there, or of twelve men, or of any men. I didn't find any sign there. The country there was a kind of a sandy desert country with greasewood around in a small arroyo there, and the wagon road crossing the arroyo and running in a kind of north and south direction. Mr. Caldwell and Mr. Farrell were with me at the time—and Mr. Borgaro also—and we examined the ground very carefully. I didn't see Borgaro any more until the next day. When the ammunition came, I went up and looked at it.

(Testimony of John K. Wrenn.)

It was twenty-three thousand rounds of cartridges that he said had come from El Paso which had been shipped to him. At that time I had a conversation with him and as to who was present—Mr. Caldwell was there on several occasions and the last time that I talked to Mr. Borgaro with reference to anything was when Mr. Mills, Deputy United States Marshal went there to take these cartridges as well as the guns—at the previous time, the guns and, later, the cartridges, on a search-warrant. This conversation was the day following the day that Mr. Mills was there, I think. I do not recall what was said; it was with reference to the guns and to the cartridges there. That conversation was at Bogaro's store. He was not under arrest at the time until the Marshal put him under arrest later. I know that the guns had been moved downstairs, the balance of the shipment of guns had been moved down in his basement and the empty boxes were placed in the basement. I cannot say if the ammunition had been moved or not. It was in the store, but if it was upstairs or downstairs, I am not sure. The arms were taken in charge by the [47—7] United States Deputy Marshal, and both arms and ammunition were stored in a place down at the old El Paso and Southwestern Depot, the Border Patrol, in one of the rooms there.

As to the defendant, Gandara, I have been really well acquainted with him since about—along about the 22d of June. I have seen Mr. Gandara in El Paso quite often before that, but I was not real

(Testimony of John K. Wrenn.)

well acquainted with him before then. On the 22d of June, I met him at the depot in El Paso and we went on the train together, coming from El Paso to Tucson. Mr. Hayes, Mr. Gandara and myself were in the same coach sitting together, chatting along. In that conversation we talked about different things, and we discussed the Mexican situation and the revolutionary situation and the Yaquis, and we were talking about the Yaquis particularly, and the movement. During our conversation, Mr. Gandara said that he was in sympathy with the movement of the Yaquis, was in sympathy with them and in sympathy with the cause, and things to that effect. He spoke of being among them and having visited them in Tucson on several occasions at a previous time, and that he attended several of their meetings—sort of get-together meetings. In other words, he would visit them. He spoke of one occasion when he was at a meeting of the Yaquis and while he was there Alfonso de la Huerta came there and made a talk to the Yaquis and kind of ridiculed Gandara with reference to his going on visits to the Indians, and told the Yaquis that Gandara was no good and things to that effect. That was, I judge, on the 22d of June, we got here on the morning of the 23d, and we separated—Mr. Hayes and myself went to the Border Patrol, and I don't know where Mr. Gandara went. Later, probably the evening of the 24th, Mr. Hayes and myself and Mr. Johnnie Farrell, Border Patrol Inspector, went out to Mesquital, which is an Indian

(Testimony of John K. Wrenn.)

village on the Santa Cruz River, south of town, six or seven miles. I went out there in a car with Mr. Hayes and Farrell, and we went to the house of an old Indian by the name of Antonio Molino at one of the houses at Mesquital, and there we saw Mr. Gandara. He was there in his car—he was out, but the car was inside of the yard of old man Molino's place. This was in the daytime. We had a conversation [48—8] with him then. Well, I met him, of course, again, and I asked Mr. Gandara what he was doing there, and he said, "Well, you know what has happened? You know it." I said, "Yes." "Well," I said, "I was surprised at you." Of course, we talked of the seizure of ammunition and guns made by the boys on the 22d at that particular place, Molino's place and the other Indians living around, and Mr. Gandara, of course, expressed himself and says, "Well, it is too bad," he said; "I am naturally for the Yaquis, in sympathy with them," and he said, "What are you going to do with me?" I said, "Mr. Gandara, I am not an arresting officer; I will have to take the matter up with the United States Assistant Attorney and the best thing I can do is to meet you to-morrow some time," which was agreed upon, and we talked about the rifles that was seized there, and the cartridges, and he said, "Well, all of that was mine," and he said, "Of course, the rifles that was taken before in this part of the country here from the Yaquis were guns that I had given them, that I had furnished them, as well as the cartridges and the

(Testimony of John K. Wrenn.)

provisions which you will find here, which the men have found here, I gave to them; and the guns in question, why, they were bought by me, and I had a man by the name of Chito Valenzuela—he was my man—to make these deliveries here; those deliveries that I did not make, and I don't believe you found all of it," he said, "I am pretty sure." I said, "Well, I didn't find it; the Border Patrol found it; I found part of it one time,"—that is, relating to the arms and ammunition. He later made a statement as to where he secured these arms and ammunition. We talked quite awhile around Gandara's car, and in the yard, and I spoke up saying there was a quantity of provisions in the house, and he said, "Well, that had been taken from them." I told him, "No," that I didn't think so; that it had been called to my attention by the boys, that they had left some provisions in the house of Molino and some of the other houses, probably. "Well," he says, "The guns—some are new and some are old; some of the guns are new and some of the guns are old, but I have furnished to these people both the new guns and the ammunition for the new and the old guns." Then the [49—9] conversation came up about him going back to town and I didn't see any more of him until next morning —probably ten o'clock or about that time. He was in town here, I think, down at the Border Patrol. I can't recall all who were present, but I would say that Mr. Gray and Mr. Caldwell and probably Mr. Farrell were there. I am not sure Mr. Gray was

(Testimony of John K. Wrenn.)

there. I believe Mr. Hayes was, and while Mr. Gandara was there, we went over the same thing—about the same line of conversation, and then from there we went up to town and we talked part of the time. He made a statement down at the Border Patrol and went on to tell about furnishing the Yaquis with arms and ammunition, provisions and different things for making the trip into Mexico, and said that he was to lead them, and that they intended to go on probably a Sunday before that, but something came up with reference to some of them not being ready to go, and that he intended to go with them within a short time after his arrival here, and, of course, the officers finding the guns and ammunition, detaining a number of the Yaquis, had prevented his going with them. That was all the conversation with reference to what he had to do with them at the time. I had a conversation with him later during the same day, on the street going up to the Western Union office. Just he and I were present. We continued talking about the movement. The question of the guns came up, where they came from, and Mr. Gandara said, "Well, I bought those guns from a man named Borgaro," or "From the owner of a store down here, Borgaro; I talked to him and he told me that he would get the guns in Tucson, at a previous time; I talked to him about getting the guns; that he was unable to get the guns here, and later he ordered them; that I designated a man named Chito Valenzuela who is a Yaqui Indian, to receive

(Testimony of John K. Wrenn.)

and pay for the guns; that is, the rifles that were found out there, the new guns as well as the guns that was not delivered, and—" he says, "I think that Chito has paid him for the guns; anyway, I gave him money to pay for the guns, that is, the full amount; all of the guns, the seventy-five or the eight cases of rifles, and that—" "And inasmuch as that only twenty-five, or a part of them, was delivered [50—10] out to the Indian village, and Chito paid for all of them, because I gave him the money to pay for them. Chito Valenzuela is his name."

TESTIMONY OF ANTONIO MOLINO, FOR THE GOVERNMENT.

ANTONIO MOLINO was thereupon called by and as a witness for and on behalf of the Government, he having previously been sworn, and testified substantially as follows:

Direct Examination.

My name is Antonio Molino. I am a Yaqui, and live at Mesquital, where I have lived fourteen years. I was living there during the months of May and June, 1927.

I saw the defendant, Gandara, during the month of May or June at my house in Mesquital. I have also seen defendant, Bishop Navarette, at Mesquital at Chico Feliz's place. They were there because that was the place where I lived. Now, I am a poor man; I have to work. This Chito came

(Testimony of Antonio Molino.)

up to my house. Chito's full name is Antonio Valenzuela. As to whether he is known by any other name, we tried to call him Chito from his boyhood days and still call him Chito. With Chito was a man named Miguel, with a Yaqui. First, Gandara came to my place. Bishop Navarette was present at that time, and was within hearing of the conversation. The Bishop was there, and he says to us, "Boys, I want to tell you something." Bishop says, "Here Gandara brought me here." "I know him since he was a child or a boy—and I want to tell you something else," he says. "Now, this Gandara, when he goes to fight, I want you to go with him." The Bishop says for us to go with Gandara. "Now," he says, "I want you to go with this Gandara to opposite side." "Now," he says, "If this Gandara does not do the right thing, hang him to the highest post you can find." (The record shows that the acting interpreter was here excused and a new interpreter called and the examination was again begun, and the witness was asked to first tell what Jose Gandara said, to which the witness replied:) "The word that I have given here, they are all written down there." (The witness was here admonished by the Court to tell it again, to which he answered:) "All that he said to us before must be written down there. I cannot state there now. There is no lie there."

The same day that Gandara came there with Chito Valenzuela [51—11] and Miguel Mantuma, he told them to go with him and say that as soon as

(Testimony of Antonio Molino.)

he got to the river with the rest of the Yaquis that he could fix everything up down there. He said that if he could fix everything up in a good way with the rest of the Yaquis that he would come back. Mr. Gandara said to the Yaquis to come with him down to the Yaqui River, and after he got down there with him, if he would fix everything up all right, that he would come back this way. That is what his statement was. After Gandara talked—I am awful old man, of the age I have got, I said, I made a remark to the rest of the Yaquis, that don't seem very good to me. He said, "I don't know." And then I made the remark there might be something happen in this affair, and then Chito and Miguel with the matter, and they said, "You beat me with those words that you said."

Bishop Navarett came there afterwards, but he could not get what he wanted with us. As to whether or not Gandara came back to Mesquital again, he comes there every once in a while,—he came back after the time I have told you about, looking for me.

I have testified that Bishop Navarette and Gandara went down to Mesquital—you have it in writing now. Bishop Navarette told us to go with Mr. Gandara; that he was there because our people was down there in war, fighting and killing people, and then, for you fellows to go with him; myself not. I were not going, but those fellows that were around there. Myself, I live there. I could not go—but I was hearing anyway. If we don't do that to de-

(Testimony of Antonio Molino.)

fend ours for ourselves, if we don't follow this religion, he says, "You Yaquis will all be smashed down all the time—all the time smashed—smash you down. If we do that, we go down and start a war, and then we clean up everything and then we can live in peace down there."

After all got through talking, at the conversation I have just related, we were all there together, these women that were here this morning were also there, about thirty there together, and then the Bishop got up and made some kind of remarks, religion remarks, to bid us good-bye. Gandara was there at the same time [52—12] the Bishop was there. As to whether Gandara said anything to the Yaquis down there, while the Bishop was there he didn't say anything to those Yaquis that came from Sonora. He talked to Chito and to Valenzuela and that other Yaqui, he says and he was fixing everything up with them. Gandara made a remark while the Bishop was there, not to me, but to the rest of the Yaquis that was there; he says, "When we get down there and we have victory, all the lands down in the Yaqui River will be left the same way as they were before." When that remark was made, the Bishop was not present. As to what Gandara said while the Bishop was there, I have told you all that he said. He said, "Boys, if we don't join together"—that's the first word he says, and then, "If," he says, well, if you ask fifteen or twenty questions like you have been asking me here, I can't say anything, because you have got

(Testimony of Antonio Molino.)

it all down there what I have said before. As to what Gandara said in the presence of the Bishop at Mesquital, he said, "Kill Mexicans"—that's all he said. Bishop Navarette and Gandara came together in a car and nobody else was with them, and they stayed, more or less, about an hour. That night that they were there, they said they had to be at Nogales the next morning, and they left there that night. They were there together only one time.

As to whether Chito and Gandara first came there together, who are they? I don't know them. This Gandara—well, you asked Gandara before. Yes, they came there together. I didn't say that I didn't believe in that enterprise, or that there would be nothing doing. And then they left and the Bishop never came there no more.

As to whether Chito and Gandara came first—yes, they were there all the time. Then afterwards Gandara and the Bishop came together. He couldn't get nothing out of us unless he brought the priest, and they went away and brought that priest.

I saw Borgaro once at Mesquital when he brought the rifles. Antonio Valenzuela came with Borgaro at the time he brought the rifles. I was irrigating when he came. As to whether I saw them there with the rifles at the time they brought them I was eating my dinner at eleven o'clock that day. I saw Borgaro at the time he came. He [53—13] had thirty rifles. I know what those rifles were to be used for. They were to be used to get up a war and

(Testimony of Antonio Molino.)

fight Mexico. At the time they brought the rifles, Chito said there were fifty rifles more and these thirty rifles that they had taken down there. He said, at the time they brought the rifles, that they were going to raise a war with the Yaquis. Them Yaquis were around in my house there and were Yaquis like me, and when they come to my house I have got to give them something to eat, and the remarks that was made was that the rifles was to go and fight Mexicans in Mexico with. At that time Esteban was with Chito and that is all. And Chito said to me, "Compadre, here is a rifle," and I said, "Not compadre—not in my house." "To set them over there," he says. As to whether Chito made any statement at the time he came down there with the rifles with Borgaro, he said nothing more than that he was coming back with more rifles. Chito said that the man that is over there gave the money to buy those rifles. I mean Joe Gandara. Gandara told me that he gave the money to buy the rifles with and Chito also told me that Gandara had furnished the money for the rifles.

Cross-examination.

I cannot tell you how old I am. I was fifteen years of age when I came here, and I registered here in the city hall forty-five years ago, and have been here all the time ever since. I never went back there no more. I have lived in Tucson all the time. I have been over at Palo Alto, and am well acquainted with Stewart and all them fellows over

(Testimony of Antonio Molino.)

there and the ranchers. As to whether or not I have been opposed to all Yaqui revolutions in Mexico—since September of last year—what war could I agree to? I am here. I don't want to leave here. I want to live here without doing anybody any harm. I have been opposed to this movement that had been started to send Yaquis down in Mexico ever since this thing about Gandara started, which was on San Juan's Day, the 24th of June. As to whether my house is a rendezvous for all of the Yaquis that came out of Sonora early in April or May of this year—they came to different [54—14] places, not only to my house. A great many of them came to my house. I am a poor, hardworking Yaqui. You think to believe him some general or something down there, but I am not. I cannot work now because I am hurt. I am injured. It has been about three months since I worked. It is not a fact that I quit working since I gave my testimony at the preliminary hearing in this cause, nor that since that time I have been drawing money from the Border Patrol that came from the Mexican Consul. They don't give me any money. There is no one that has given me a five cent piece. As to where I get my money to live on for the past three months, I have a boy to provide for me. His name is Felipe Molino.

I know a Yaqui Indian woman named Lupe Mendibles who lives on the road from Mesquital, over to 6th Avenue. I talk with her all the time. She is my *comadre*. I never told her that I was

(Testimony of Antonio Molino.)

getting $2.00 a day from the Mexican Consul for this testimony. I didn't tell her a word. I never told her I was to get money for the testimony I was to give here.

All the world knows that a large force of Yaquis—about one hundred and fifty in number—came over from Mexico along in April and May of this year, and as a matter of fact I know that those Yaquis came up from Mexico in order to get a supply of ammunition to take back to the other forces of Yaquis in Sonora, and that was their purpose in coming here, and they were going back again.

Bishop Navarette didn't come to my house. He went to Chico Feliz's house, and Chico Feliz was there and a crowd of about thirty-five Yaquis who had come up from Sonora to receive this ammunition. There was about thirty-five Yaquis in my house, and I was harboring these people there myself. I was harboring them because of sympathy and the way they looked. Their clothes were all torn and ragged and things like that. A great many of them were working right there. I don't know if they were working for money to get ammunition to take back to Mexico. I did testify here that I knew that they were gathering up cartridges, and I knew it because they were going to give us some. At our home in Mexico we could not live; we can [55—15] not own our homes. There is no way for us to own our homes. If we go to work and raise one or two or three cows, then the Government comes in and takes it away from us.

(Testimony of Antonio Molino.)

If we raise a hundred sacks of grain, it would be all taken away. It is not a fact that these people came here to consult with these Yaquis in Tucson. They were brought here by Juan Frias—these Yaquis that were down around my house there, they were living there—Juan Frias had them there. I had nothing to do with the movement at all. I had nothing to do with Gandara or anybody. I went over to Chico Feliz's house every time Gandara came there, to hear and observe what was going on, and I was suspicious, like it happens now, that nothing happened. All the Yaquis that were there have not gone back to Mexico. They are there. I don't think any of the Yaquis who were there the night that the Bishop spoke, are here. I think they were over in Phoenix or somewhere else.

On the night when the Bishop went there, the Bishop came with Gandara and talked for about five minutes and all he said was that he had known Gandara for a number of years and that Gandara was a good, honest man, and that is the substance of what he said there. He didn't say any more.

I cannot state to you what date or what time it was when Borgaro and Chito Valenzuela went there, because I am not a person that has been studying and am not educated, but I saw him there one day at eleven o'clock. My compadre, Chito or Antonio Valenzuela was with Borgaro. I don't know where Valenzuela is. I have never seen him since the time they took the rifles away from us. I don't know how many rifles they got. They never got

(Testimony of Antonio Molino.)

any at my house. They got rifles from different houses. I didn't know that those rifles were buried. They buried them. They dug some of the rifles out of the chicken-house in my house, but I didn't know they were buried. I didn't bury them there at my house. I don't know who buried them there. Those fellows that had the new rifles, they must have left those rifles there. I was there when they dug the rifles up. They got me up there and they brought me here to court. They brought me on this side first, and then they took me down to the Border Patrol. [56—16]

I have known Borgaro since he married Don Wesa's daughter. I have never been dealing with him, and never bought any ammunition at all from him. The automobile he came in was a big car. I don't know what color, and I don't know anything about cars. I was eating at that time. I couldn't pay any attention to the color of the car. I was paying attention to my eating. I came from my work and had to get back and get to my work again. While they were unloading the guns, I was inside in my house eating. I saw them unloading the guns, and I told them that they were unloading there, not to unload them there, to unload them somewhere else. Chito was sitting in the car smoking a cigar. As to who helped unload the guns, a woman went to take them and wanted to take them in my house, and I told them not to take any in my house, to take them over there. That woman's name was Lola, but I don't remember her last name.

(Testimony of Antonio Molino.)

She is not here to-day, she is gone to Marana. Lots of the boys helped, but they are not here now. The boys of Chico Feliz were there. They are not here. Francisco Feliz was not working. I don't think he was there at the time those guns were unloaded. I don't think Juan Alvarez was there, because I didn't see him there. I think Jose Rivera was there. He was carrying some guns. I don't know if I saw him there. They took them over towards Chico's—on the other side of Chico's place. I don't know what they were going to do with them. I don't know if Antonio Cupas was there. I didn't see him. As to whether Francisco Valenzuela was there—that poor fellow don't know anything. I don't know that they brought him here.

As to whether I ever talked to the Mexican Consul about this case, or talked to him a little while ago out here in the hall at noon, I don't even know if that is the Mexican Consul or not. I don't know who the Mexican Consul is, and I don't even know him by his spots. I don't know anything about his spots.

The first person I talked to about what I knew in this case was Mr. Perrin, the Assistant United States Attorney. I talked with only one Friday evening, and with those two men along about San Juan's Day. Every time they brought me here, I have talked with them. [57—17] I have been here to talk this thing over three times.

As to how many conversations I had with Mr. Gandara out there at Mesquital, every time that he talked with me I had a conversation with him.

(Testimony of Antonio Molino.)

When he didn't talk to me, I don't talk to him. As to how many times he did talk to me, I have no pencil to put down the times he spoke to me, but every time he speaks to me I speak to him, and he told me he wanted to go down with these Yaquis who were returning to Mexico. That is about all that he did tell me. No more. That is all what he told me. What I have seen—is no more.

Redirect Examination.

In answer to Mr. Hilzinger's question, that when the Bishop was down there, he didn't say any more than that Gandara was a good fellow; what I have said is true. What I have stated on direct examination about the Bishop talking to the Yaquis in reference to going to Mexico to fight is correct. That is the truth. And what I stated on direct examination as to what Gandara said about going down to Mexico and fighting is correct. That is true.

TESTIMONY OF FRANCISCO FELIZ, FOR THE GOVERNMENT.

FRANCISCO FELIZ was thereupon called by and as a witness for and on behalf of the Government and was first duly sworn and testified substantially as follows:

My name is Francisco Feliz. I am a Yaqui Indian. I do not know how long I have been in the United States. I came here when I was seven years old. I came to Tucson, and I have not left Tucson. I was around Tucson during the months

(Testimony of Francisco Feliz.)

of May and June, 1927. I know Jose Gandara, and I saw him during the months of May or June, 1927, at my house at the Scotch Farms. He was not doing anything there. He came there to see the Yaquis that had arrived from Sonora. Chito Valenzuela came with him. Gandara told the Yaquis, who came from Mexico, that he was going to help them, and that conversation was held in the presence of Chito. I have never seen Jose Gandara at any other place.

Q. Did you ever see this man who is seated over here, Bishop Juan Navarette? A. Yes, sir.

Q. Where did you see him?

A. I saw him at my house. [58—18]

Q. What was he doing out there?

A. He came there to talk to a number of Yaquis.

Q. Was Jose Gandara there at the time he was there? A. Yes, sir.

Q. And were they out of hearing of each other?

A. There were some people there.

Q. And what was said at the time by Bishop Navarette?

A. He said to come with— He said to go with him, that he would help him.

Q. To go with who? A. With Gandara.

Q. And what did he mean when he said, "Go with him and he will help you?

Mr. CURLEY.—We object.

The COURT.—Objection sustained.

Q. Did he say anything else?

(Testimony of Francisco Feliz.)

A. He was going to help him for the Yaqui River, to make peace down there.

Q. And was the Bishop talking about that?

A. Yes.

Q. And now, what did Gandara say?

A. He says he was going to go with him to the Yaqui River.

Q. What did he say he was going to do down there at the Yaqui River?

A. He was going down there with him, to put them down in peace, so they could be settled down, put them all down in peace.

Q. Did he say how he proposed to put them down in peace? A. No, sir.

Q. Did he say how he was going to get down to Mexico?

A. He was going to walk with them to Mexico.

Q. Was he going to take anything with him?

A. He was going to take some rifles.

Q. Did he say what he was going to do with those rifles?

A. They were going to help themselves with those rifles, because the government was at war down there.

Q. And did they say what they were going to do with the rifles? [59—18a]

A. They were going down to fight against the government.

Q. What government?

A. Mexican government.

(Testimony of Francisco Feliz.)

Q. Did he say this in the presence of Bishop Navarette?

A. No, he didn't say, but he said it afterwards.

Q. Did he say anything of this kind when Bishop Navarette was present?

A. When Bishop Navarette went out he said it.

Q. Was Bishop Navarette there at any time that he talked about going down to Mexico?

A. Yes, sir.

Q. What did Gandara say about going to Mexico while the Bishop was there?

A. When the Bishop was not there, he didn't say anything. After that, Gandara said he was going to go along with the other men to Mexico.

Mr. HILZINGER.—We object. He said he didn't say anything.

The COURT.—Repeat the question and let him answer again.

Q. (Repeated by reporter.)

A. To tell the truth, I don't remember what he said or what happened.

Q. Do you know what he was talking about at the time?

Mr. HILZINGER.—Who?

Q. Do you know what Gandara was talking about at the time?

Mr. CURLEY.—At what time?

Q. At the time the Bishop was there?

Mr. HILZINGER.—He said he didn't say anything at the time the Bishop was there.

(Testimony of Francisco Feliz.)

A. I don't remember what he said; I said a little while ago what he said.

The COURT.—Was the Bishop there when he said that?

Mr. PERRIN.—Yes, sir. [60—18b]

I have never seen the defendant, Borgaro, out at the village, but I have seen him here at his store, but not around Mesquital at any time. I know there were some rifles taken down at Mesquital, but I don't know who took them. I was not present when they were taken down there. I was at my work. I was just coming from my work when Gandara came there with the ammunition, but I don't recall the date. I think it was in June, after San Juan's Day. As to how long after, I don't understand that question what you asked me before, last San Juan's Day, he says. It was before San Juan's Day. When he brought the ammunition down there, he was by himself. He came in his car. I didn't count the ammunition. I couldn't tell how much there was. He had it in sacks, and I didn't count the sacks. There was a small amount, I could not tell how much. The sacks were full. Gandara hid the ammunition right on the edge of the bank of the river. That is, [61—19] the rest of the Yaquis that were there, they took the ammunition and hid it. I was in my house and had nothing to do with the ammunition. I saw them hide it. The Yaquis and not Gandara hid the ammunition. Gandara came there and got off his car and told them he had ammunition for them. I heard him

(Testimony of Francisco Feliz.)

say that, but he didn't say where he got the ammunition.

(Adjournment was here taken until 9:30 A. M., November, 23d, when the same witness resumed the stand.)

I understood every question that was asked me here last night. I testified that the Bishop came down to my place, which is over here towards the Scotch Farms Ranch, that is, at Mesquital. The Bishop did talk to someone at Mesquital. He talked to several that were there. I heard him talk. He told those Yaquis that came from the Yaqui River that he was going to help them. He said he was going to help them any way he could and was going to help them over there in their own country. He said he was going to help them by working for them so they could be in peace and to go down and be in peace. That is all he said right there. That he was going to go over there and make peace so they could all live happy. As to how he said he was going to make peace, he said any way he could. That is all that I heard. Nobody has been down to the village talking to me in the last few days. The Bishop said he was going to give them arms and ammunition and everything so they could go back. He said that in his talk to the Yaquis. Gandara was with him then. I have not stated that I saw some guns delivered at Mesquital. I never saw Esteban Borgaro at Mesquital at any time. I have seen Chito Valenzuela at Mesquital. He would come there with Gandara. They had a talk there,

(Testimony of Francisco Feliz.)

but I don't remember at this moment what they said. I have heard Gandara talk about guns and ammunition. He said he was going to give the Yaquis some ammunition, but he didn't say how much. He said the ammunition was to be taken down to Sonora, that the Yaquis were going to take it and he was going to go along with them. He said he was going along with them. The Mexican government were fighting with the Yaquis and they were going there with the Yaquis to talk for the Yaquis, going to use this ammunition to talk with. Chito never said anything about [62—20] going to Mexico. He was at Mesquital with Gandara, when Gandara told the Yaquis about going to Mexico.

Cross-examination.

I have been here since I was seven years old. I live out at this place, Mesquital; I do not speak English. This place Mesquital is right on the side of the road and right between the road and the Santa Cruz river-bed, and there is a lot of mesquite there. The village consists of three or four houses and I live in one of them and Antonio Molino and Juan Alvarez and the others live just a little bit aside. My house is about thirty feet from Antonio Molino's. It is not one hundred feet. I haven't measured it; it may be. This house of mine is a meeting place for the Yaquis who came out of Sonora along in April or May of this year, and my house was a meeting place for the Yaquis in May of this year. As to how many of those Yaquis were there

(Testimony of Francisco Feliz.)
that came up from Sonora. There were several. I didn't count them. I think there were probably fifty all together. I didn't count them. There may have been one hundred. And they would meet quite frequently at my house. They came to my house because they were Yaquis and I let them stay at the house for the reason that they were hard up and I let them stay there and harbored them in my house. And these men had been engaged in a revolution in Sonora prior to the time they came up there and they were after them. They had been fighting before they came here and they were right after them. They came up here for the purpose of getting arms and ammunition to take back and go back and fight. That is true; they didn't come because they wanted to come. Juan Frias told me that he had a company here that was going to furnish him all of that stuff and that is what they came up here for—to get that stuff and go back and fight. Some of those Yaquis have gone back—a few of them; I have not counted how many are left here now. They have got scattered around. Nobody ever asked me to go down and fight during this period. The truth of the matter is that these men came up from Mexico and they had been engaged in a revolution there and some of them have went back. I was arranging these [63—21] meetings down at my house. I did not call anybody. As I said before, they came there very hard up, very poor, and they knew that these people came there and they came over there. There were not

(Testimony of Francisco Feliz.)

forty men, but there were about fifteen and they lived at my house, waiting until they got some clothes to get out. As to whether they were to go back to Mexico, some of them remained here, but I did not count them.

Molino was there the night the Bishop came. He was over at his house. They came first to Molino's house and then from Molino's house they came over to my house. The Bishop stayed about half an hour and he talked all that time. That was outside of the house. Right there he told them he was going to help them. He told them to go with him and he would give them peace, so they could live in a quiet way and that Mr. Gandara was going along with them, and that is all I can remember. I remember everything, but what does not happen you cannot remember. As a matter of fact the Bishop went there and told these Yaquis that he wanted to see them in peace in Mexico, and that is all that he said, and it took him a half an hour to say that. Gandara spoke there that night, but when the Bishop was there he didn't do any talking. It was after the Bishop was there that Gandara did the talking, and Gandara then told them not to be afraid of him, to go with him, and that is all Gandara said. He talked a little while. Molino was there then. Gandara did not talk at all while the Bishop was there. I am a Catholic. Gandara stayed there after the Bishop left and the substance of what Gandara said there was that he was going along with the Yaquis and he was going down there

(Testimony of Francisco Feliz.)

to help the Yaquis. I know that the Yaquis had been in revolution for a long time against the Mexican government. The Mexican government had taken their lands from them, and they were trying to get back what was theirs and that is what those men who came to my house had been fighting for down there. He said they followed them around wherever they hid themselves; they have got to help themselves some way. This meeting when the Bishop was there was before San Juan's Day. I have not seen any [64—22] of these gentlemen here with ammunition and guns except Gandara and he had ammunition. I never saw the Bishop with any guns or ammunition, and I never saw Borgaro with any guns or ammunition. As a matter of fact, the Bishop did not say anything about furnishing arms and ammunition to the Yaquis. It was Gandara who said that.

I have talked to no one about this case. I do not know the Mexican Consul at all. No one has paid me for coming here. I always worked for Manning, but I am not working for him now, right now I am not working. I quit working about two weeks ago. I was working for Mr. Nichols and they called me over here and I had to come here. I always occupied myself at work, and when this thing came up and happened in my house, they carried me from one place to another around here. I have not talked this matter over with Molino—I talk what I see—that is all, what I see. Molino did not tell me to be here and be sure and tell here that the Bishop

(Testimony of Francisco Feliz.)

said that he would furnish arms and ammunition to the Yaquis. Molino never told me anything. He is an old man and I hardly ever talk to him. I never have talked with Molino about this case at all. We talked about some other matters. I live in my house and he is in his own house. The truth is I don't know the Mexican Consul, and he has never talked to me about this case. I have talked to Mr. Wrenn a good deal about the case; when I come here I talked to him and Molino was present when I talked to Mr. Wrenn. As to whether or not Mr. Wrenn told me what to say down here, no, he didn't. We know what to say.

Redirect Examination.

Did I state, in answer to your question, that the Bishop told me he would furnish arms and ammunition? I don't remember if I have said that in direct examination. Owing to the fact that I am a Catholic I am afraid to say anything against the Bishop. I kind of hesitate to say anything against anybody for the reason that I am here now. They just carry me about, back and down. I don't want to be here at all.

That is the reason that I am not telling all about what happened down there—I have said all that I can remember. I have told Mr. Hilzinger, counsel for defendant, that they had not talked [65—23] to any of the Yaquis down there except the ones who were going back to Mexico. All the Yaquis that were in the village heard the Bishop's words.

(Testimony of Francisco Feliz.)

Three of us living in the village had lived there before the others came out of Mexico. Myself and Antonio Molino and Juan. Altogether there were four Yaquis that lived in the Mexican village and now there are two more living there. At times the Bishop talked to me there at my house, and those that lived around there, they would listen. No, the Bishop never talked to me personally, myself; I went away and when they said that the Bishop was coming there, I came back there to where the Bishop was. As to whether he talked to anybody personally, he talked to some of them there. He didn't pay no particular attention to which one. He talked to several of them around there. The Yaquis said the Mexican government had taken the lands away from the Yaquis, that they are up in the mountains—they are after them, right after them all the time. Mr. Gandara didn't say anything about the government taking any lands away from him and the Bishop didn't say anything about the government taking any lands away from him. I didn't hear anything about the Bishop down there at the village saying that he had any grievance of any kind against the Mexican government.

TESTIMONY OF GUADALUPE FLORES, FOR THE GOVERNMENT.

GUADALUPE FLORES was thereupon called by and as a witness for and on behalf of the Government and was first duly sworn and testified substantially as follows:

(Testimony of Guadalupe Flores.)

My name is Guadalupe Flores. I am a Yaqui. I live over here on 29th Street. I have been living here for a short time. I was living in the United States during the months of May and June, 1927. Before that I was here a long time. I was down at the Yaqui village near Mesquital during the month of May or the month of June, 1927. While I was down there I saw Bishop Navarette at Mesquital, the man sitting there. Someone came down to Mesquital with him. I know who it was that came with him. I have seen this man sitting there, before (indicating Mr. Gandara). I saw him at Mesquital. He was there at the time the Bishop was there. Referring to Jose Gandara, the man there, he was there. He was there at the time the Bishop was there [66—24] at Mesquital. As to whether Jose Gandara and the Bishop came to Mesquital together, during the night I didn't know them, but they were there. I heard the Bishop, Bishop Navarette, say something to the Yaquis at Mesquital. Bishop Navarette stated to the Yaquis that he wanted to help them. He said some things. In regard to wanting to help the Yaquis, he was going to help them so they would go down to Mexico and fight, for we could not, we were tired out and the people would not go, because they were tired. That is all I heard. As to whether Bishop Navarette said anything about furnishing arms and ammunition to the Yaquis, he says that he wanted to help them, to give them his hand to help them to fight the cause. The Bishop said he wanted to fur-

(Testimony of Guadalupe Flores.)

nish ammunition and guns, so we could go down and help them fight the cause out. He said we were to fight with the Mexican government. We were going down to fight with the Mexican government—just we were long in the Yaqui River and we were going back there with him. That man sitting there, Jose Gandara, said something to us about furnishing us with rifles and ammunition. He talked to us about rifles and ammunition at Mesquital. That is all. I don't know any more.

Cross-examination.

I have been here a short time. I was one of the Yaqui Indians who came from Mexico in April or May. And I came on the American side. I was not picked up by the Border Patrol and taken to Nogales. Twenty-two men came with me. They were not picked up by the officers along the line; they didn't pick us up. We came right to Tucson, twenty-two of us. And we were not apprehended or put in jail at all. We came up here for rifles and ammunition. We had been fighting in Mexico on the Yaqui River. We had been fighting there a long time. Five years. I, myself, had been fighting for five years. There are some thousands of Yaquis up in the mountains in Sonora. More than about two or three thousand, and the Mexican government has been taking their land away in the Yaqui Valley and that is the reason we were fighting. There have been several Yaquis fighting for the last year or so down toward the last, in the mountains. A great number. This rebellion of the

(Testimony of Guadalupe Flores.)

Yaquis has been going on in Mexico for a long time, over sixty years. [67—25] I came to Tucson because I have my family here in Tucson. The other twenty-two men were coming here to work; they have got their families here. I didn't say a while ago that I was going back to fight. As to whether the other men were going back to fight, they were working; I don't think they will go back no more. They didn't intend to go back at the time they came in. I don't know if they were going back, or not. I wasn't going back. As to what I was doing at that meeting, at Mesquital, I have my family there at Mesquital; I was living there. I just moved here lately, over to this other Yaqui village down here. As to who I was living with in Mesquital at the time of the Bishop's visit there, I was working for Mr. Nichols and I had my family at Mr. Nichols' house. I did not live at Mr. Nichols' house, I was living in the same land that belongs to Mr. Nichols. As to whether I wasn't living at Mesquital, it is the same place there, he says, right next. I was living with Molino. Molino is an acquaintance of mine. We are not related. I lived with Molino about a month or a month and a half when I got out of work there I moved over this way. I was living with Molino at the time the Bishop made his talk in Molino's house. I don't remember what the Bishop said. I didn't hear him. As to whether Molino is the man that told me what to come and say here, he didn't tell me anything. I have talked this matter over with

(Testimony of Guadalupe Flores.)

Molino—the first word that I told you—that is all. I have forgot what I said, the first word. They have got it down there. No one told me to say that they have got it down here. I haven't talked this over with Chico Feliz; I live here, he says, on the edge of town and they live out at Mesquital. I could not talk to them. I have never seen the Bishop before; not before. I don't remember what he said. I was away from the house when he said it. As a matter of fact I didn't hear anything the Bishop said; I didn't understand what he said. When I stated, a little while ago, that I heard him, I was not telling what somebody else told me to tell here.

Redirect Examination.

I did not understand all of Mr. Hilzinger's questions. I told you I heard the Bishop talking, but I didn't understand what he said. A little while ago I told you what I heard him say, those few, only a few [68—26] words that I understand what he said, and the rest of that I didn't hear what he said. I understood those few words. As to whether I heard him at that time say that he was going to furnish arms and ammunition, yes, there was two of them there at the time.

Recross-examination.

I don't know which one of the two said that they were going to give arms and ammunition in their talk.

(Testimony of W. L. Conger.)

What I told you was the truth, the straight of this thing, that I did not hear anything the Bishop said. That is the truth. [69—27]

TESTIMONY OF W. L. CONGER, FOR THE GOVERNMENT.

Direct Examination.

My name is W. L. Conger and I live at 817 E. Speedway, Tucson, Arizona. I have lived in Tucson since 1920, and I lived here all this year. I am acquainted with Mr. Borgaro. I have been acquainted with him since first coming to Tucson, or shortly thereafter. I have had business dealings with him, selling merchandise. I had business dealings with him this year and sold him some rifles. Mr. Borgaro came to my house and asked me if I could procure these rifles for him and I told him that I did not know, that I would try, which I did, as you know, getting quotations. Well, they came to my house and Mr. Borgaro asked me if I could get these rifles for him, some 30–30 rifles, and the amount, he said, could be anything that I could get, fifty or one hundred, I believe, and I told him that I did not know, that I would try to get them, so that was about all the conversation there was that evening. I took no notice of the time that Mr. Borgaro came to my house, but I would say it was about, around 7:30 or 8 o'clock in the evening, along that time. In those other business dealings I had with Mr. Borgaro I was acting as a salesman for Dunham, Carrigan & Hayden Companyof San Fran-

(Testimony of W. L. Conger.)

cisco. I was not acting in that capacity at the time Mr. Borgaro consulted me in reference to the rifles. The next day, the next morning I went down and wired to Dunham, Carrigan & Hayden Company and asked if they had the rifles in stock. I do not recall that I had any correspondence with Dunham, Carrigan & Hayden Company in reference to these rifles until after they were shipped. I sent a telegram and received a reply in which they said they could furnish the guns at a certain price. Mr. Borgaro stated at my house that he wanted to get the guns as soon as possible. He did not make any statements in my house as to whether he had made inquiries around town for rifles and to the best of my knowledge, did not inquire as to whether there was an embargo on arms into Mexico. I did not have any discussion with him that evening as to whether he could sell the guns outside of his store, but he asked me if he could sell the guns from the store and I told him he could retail them, in a retail way, one or two at a time. I did not offer him any advice as to extradition or as to embargo. [70—28]

I did not receive any reply from Dunham, Carrigan & Hayden Company, in reference to the rifles before they were shipped, no reply at all, only the telegram, and then I wired back, ordering the guns. They were to be shipped by express, I don't know whether shipped c. o. d. or not, or shipped to shipper's orders, shipped to Dunham, Carrigan & Hayden Company notify Borgaro and to be collected

(Testimony of W. L. Conger.)

on delivery. As to the arrangements made at the bank for the payment of the rifles, Mr. Borgaro and I went to the bank, the Southern Arizona Bank & Trust Company, and he did not have sufficient money in the bank so he borrowed money and had the bank deposit money to cover the order for Dunham, Carrigan & Hayden Company. I think the amount he borrowed was $1,200.00, I do not remember exactly. The total cost of the rifles that were shipped was twenty-one hundred and some dollars, I don't recall the exact amount, twenty-one hundred, I believe, as near as I can remember. I held a conversation with Mr. Borgaro in his store, subsequent to that time, at which Mrs. Borgaro and the man he had as saddle worker or harness worker were present. Mr. Richey was present at one time. The time when Mr. Richey was present as I recall it was the next day or two after the guns were delivered to Mr. Borgaro. There was no conversation with Borgaro in reference to the time the guns were shipped, they were simply ordered shipped, there was no conversation except the evening he was out at the house. As to my statement a little while ago that I had held a conversation at his store, that was after the guns were shipped, within the next day or two, I said I saw him. That time it would be Mrs. Borgaro and Mr. Borgaro and this harness man and at other times it would be only Mr. Borgaro and at other times Mrs. Borgaro who was present during the course of the conversation. As to what she said in reference to the shipment of rifles—I know

(Testimony of W. L. Conger.)

that the first conversation I recall after the shipment was received, how the shipment was delivered to him without the payment of money; the Express Company delivered the guns to him without the payment of the money, which they should not have done, and the first conversation was with reference to this, and then he went down to the bank and drew his check in favor of Dunham, Carrigan & Hayden Company.

He had a conversation with me in which he stated that the [71—29] rifles had been seized, he did not make any further statement. I have been to Mr. Borgaro's store on numerous occasions and have previously sold Mr. Borgaro arms and ammunition. As to how this order compared with previous orders placed with me by Mr. Borgaro it is much larger. I could not state positively but I should say as to previous orders of 30–30 rifles that the amount he had ordered was within a half a dozen, six.

Cross-examination.

As to whether the conversation was held with Oscar Richey—I don't know what his name is. Mrs. Borgaro was there and Borgaro was not the first time. I have dealt with Mr. Borgaro ever since 1920 and I know that he runs a store down there. He handles a general line of hardware, guns and ammunition, and he handles curios, Indian curios, baskets and blankets, and he handles chaps, leather coats, bicycles and repairs, toys for children and some jewelry and Mexican and Indian novelty work.

(Testimony of W. L. Conger.)

I know that he has not been carrying on that store ever since I have been here, Mr. Davant had that store when I first came, but I know Mr. Borgaro soon after he took the store over. I don't know really how long Mr. Borgaro has been carrying on the store; I do not know what time he took it over from Mr. Davant. I was acting for my company and considered this as an ordinary business transaction, and customary with Mr. Borgaro in that business. I had no record of the date that he came to my house, I think it was in June, 1927.

Redirect Examination.

It was customary for Mr. Borgaro to order ammunition or guns from my firm, but it was not customary for him to come out to my house in the evening to place an order. He never did that before. [72—30]

TESTIMONY OF B. F. HALLIDAY, FOR THE GOVERNMENT.

B. F. HALLIDAY, called as a witness for the Government, having been previously sworn, testified as follows:

Direct Examination.

My name is Benjamin Franklin Halliday. I reside in San Francisco, California, I am sales manager for Dunham, Carrigan & Hayden Company and have acted in that capacity about a year. I was acting as sales manager during the months of May and June, 1927. During the month of

(Testimony of B. F. Halliday.)

June, 1927, we had a telegram from Mr. Conger of Tucson, Arizona, which I have in my pocket, that is, W. L. Conger. (Witness produces telegram.) This telegram was received at our store at San Francisco from the Western Union Telegraph Company and delivered to our place of business. It was addressed to Dunham, Carrigan & Hayden Company, San Francisco, and signed W. L. Conger. This is the original telegram. (Telegram was here offered and received in evidence and read as follows: "Can you furnish for local dealer here 75 or more 30–30 repeating Winchesters or Carbines. Give cash price and state if you can deliver. Signed W. L. Conger.") As to whether we received any communications in reference to these rifles—we received an order for the rifles which was signed by W. L. Conger, which was in the form of a telegram ordering the guns. That telegram was received at our store in San Francisco and delivered by the Telegraph Company. It came to our firm, but did not necessarily come to me in the ordinary course of business. I do not know whether this particular one came to me or not, it might or it might not have. (This telegram was here offered in evidence. Sight draft, notice of shipment, notice of sight draft, letter from credit department of Dunham, Carrigan & Hayden Company to the Southern Arizona Bank and Trust Company, of letter from Dunham, Carrigan & Hayden Company to Southern Arizona Bank and Trust Company and copy

(Testimony of B. F. Halliday.)
of letter from credit department to Southern Arizona Bank and Trust Company. All of which documents were identified, offered and received in evidence, the contents of which are not set forth in transcript.) In pursuance to the orders that were placed the rifles were shipped, I do not know how many, whatever the invoice called for, whatever the order called for. [73—31] These rifles were shipped to Tucson. We have previously done some business with Mr. Borgara, but I do not know what his order was. I do not recall of any previous order having been placed as large as that. [74—32]

TESTIMONY OF C. M. OROSCO, FOR THE GOVERNMENT.

C. M. OROSCO, a witness for the Government, being duly sworn testified as follows:

Direct Examination.

My name is C. M. Orosco. I live at 270 N. Convent Street, Tucson, Arizona. I have lived in Tucson all my life—30 years. I am a clerk for the American Railway Express Company and have occupied that position for about six years. I was on duty about the 9th day of June, 1927. I am acquainted with Mr. Esteban Borgaro, Jr., who is seated back there. I have been acquainted with him 8 or 9 years. I saw him on the 9th day of June, 1927, at the express office where he called for the purpose of inquiring for a shipment. He

(Testimony of C. M. Orosco.)

did not state what kind of shipment. I saw him at the express office I believe two times on the 9th day of June; it must have been around, I do not know,—9 or 10 o'clock in the morning. As to whether a shipment was received at that time by the express company for Mr. Borgaro—well, it was sent out for delivery. I did not make the delivery, but Mr. Borgaro inquired of me as to the shipment. Mr. Borgaro went into the next department, that is the unloading department. I saw him later on in the express office at which time I had a conversation with him. He asked me if the shipment was in and I told him, "Yes." He asked me when it was to be delivered and I told him to take it up with the driver and he went back again. I don't recall the first time he came, but it must have been about 8:30 or 9 o'clock, and the second time he called was around 10 o'clock. I saw the shipment that was received and I think I could identify the boxes. (Here witness stepped down from witness-stand and examined the boxes, four large and one small box.) This is part of the lot of the shipment of eight.

Cross-examination.

As far as I can tell these are in the same condition as they were when received at the depot on the morning of June 9th. As to whether these signs on here "Winchester Double Action Sporting Carbines" and, etc., and the one "Winchester," on the side, painted on there, are the same as they were at that time—well, well, at the time I

(Testimony of C. M. Orosco.)

saw them I did not look at all the Winchester marks. I saw the address on it and the markings on it. As far as I know there is no change in them [75—33] from the time I first saw them down there when they were received. They came in regular shipment boxes for Winchester Arms, eight boxes of rifles. I never saw a shipment before of arms. I have seen gun shipments, all the different makes, I guess. These came in the regular course of business of the American Railway Express Company and were handled regularly in every respect. There were eight boxes in the shipment. I remember a card that I identified before the Commissioner. I did not see the person who received the shipment, sign it. I saw it after it was signed. That card was not signed but the original was, that was just a copy of the original card. [76—34]

TESTIMONY OF W. E. JONES, FOR THE GOVERNMENT.

W. E. JONES, a witness for the Government, being duly sworn testified as follows:

Direct Examination.

My name is W. E. Jones. I live in Tucson at 52½ Driscoll Street. I have lived in and around Tucson for nine years. I am a bill clerk in the express depot and have occupied that certain position about two months, previous to that time I was a chauffeur for the express company in which

(Testimony of W. E. Jones.)

capacity I acted a little over two years. I was on active duty during the month of June, 1927, and on the 9th day of June, 1927. I am acquainted with Esteban Borgaro, Jr., who is seated back there. I have been acquainted with him as long as I was driving for the express company and delivered stuff there. I saw Mr. Borgaro on the 9th day of June, 1927, at the express office and down at his place of business. I saw him at the express office, well, I think about 9 o'clock. He came there like most others who come down there in a hurry for their shipments. He did not state what the shipment was that he wanted; he asked me if there was a shipment there for him and he said about—I don't know now whether he stated the amount of boxes or not, and I told him I could not tell him until the stuff was checked off the train. He said, if so, what time could I come down there, so I could not tell him exactly then, because we were pretty busy, but I thought probably before dinner, and so he came back some time later and I told him I would be down there between 11 and 12. He came back later I think about 10 o'clock. After that, well, I loaded the boxes on the truck with some other stuff and took it down to his place of business, and I got there about 11 o'clock or a little after. His place of business is at 41 South Meyer Street. I took eight packages or boxes down there, but I could not swear what they contained, I never saw inside of them, saw them opened.. The boxes I took down

(Testimony of W. E. Jones.)

there to his place of business I helped one of the boys take them inside. His place of business is on the corner of Broadway and Meyers, it is on the northeast corner, and I made the delivery into his place from Broadway at the back of his store. There is a door there opening on Broadway and there was a boy there that helped me carry the guns inside. After we carried them in we just stacked them up—laid the boxes down flat over by the counter on the far side. After that I [77—35] had him sign for them and pay the express charges. I have the receipt here which he signed. That is my signature on the receipt and that signature was placed on there at the time the delivery was made and this signature was placed on the card by Mr. Borgaro in person. (Card was here offered and introduced in evidence.) I did not hold any conversation to amount to anything with Mr. Borgaro when delivery of these boxes were made. He did not make any statement with reference to the rifles. (Witness was called from witness-stand and asked to examine the boxes which he did.) And I see there is no way bill reference on the sticker, but it appears to be the original lot sticker that is on it. There is no number on it or the date of the shipment, it has the amount of boxes and that is all. That label shows a money value amounting to $1,709.50. All the box numbers have a lot number on them. As to whether the marks on the card correspond to the marks on the boxes—here is the difference—it will state—

(Testimony of W. E. Jones.)

this has the first name Dunham, C. &. H. abbreviated and just cut off the initials on there of the name, you see. This card indicates the shipment of eight boxes of guns. In my opinion these are the same boxes that I delivered.

Cross-examination.

These boxes of guns in that shipment came in the regular course of business through my company and I delivered them in the regular course of business at the place where I always delivered goods to Mr. Borgaro in his store, at 11 o'clock in the morning. [78—36]

TESTIMONY OF B. F. HALLIDAY, FOR THE GOVERNMENT (RECALLED).

B. F. HALLIDAY, a witness for the Government, having been previously sworn, was recalled and testified further as follows:

Direct Examination.

Witness on being asked to examine the invoice of the cases containing rifles shipped by Dunham, Carrigan and Hayden Company of San Francisco to Esteban Borgaro, Jr., at Tucson, Arizona, and state whether there were any identifying marks on the cases that would correspond with the invoice, and whether he could determine that the shipment is the shipment described in the invoice, the witness after having made the examination replied as follows: "This is our case, and that one is ours; that one is ours; that is ours and this is

(Testimony of B. F. Halliday.)

ours." These are the same cases as described in this invoice.

Cross-examination.

As to whether those cases are in the same condition in which they were shipped from San Francisco, that is, with reference to labels and markings and all, that one is—all the casings have the same markings, yes, sir, on that they had. I presume it is a standard box that we use for shipping 30-30 rifles—this, I presume, is a full factory case, ten of these rifles to the case and we just put the shipping mark on them, on the original case we receive. I don't think these cases ever had been in our place. The boxes we receive the ten guns in, if the man orders ten guns in the case; in that case we would use them as the original shipping case, but if it were a repacked case it might be anything,—might be these and might be our own. Those are the original packer's cases and come from the factory and those we would have in our warehouse. We use them and ship them just as we receive them from the factory as a full box is ordered.

Redirect Examination.

I am quite certain we do not keep a record of the numbers of the rifles as they pass through our house—the serial numbers appearing on the rifles. [79—37]

TESTIMONY OF JOHN J. FARRELL, FOR THE GOVERNMENT.

JOHN J. FARRELL was thereupon called by and as a witness for and on behalf of the Government and was first duly sworn and testified substantially as follows:

Direct Examination.

My name is John J. Farrell. I am a deputy sheriff at the present time. I am a deputy sheriff of Pima County, Tuscon, Arizona. [80—38] I have been a deputy sheriff for about three months. Previous to that time I was a Patrol Inspector in the Border Patrol, United States Immigration Service, since 1924. I was acting as Patrol Inspector during the month of June, 1927. I know the defendant, Esteban Borgaro, who is seated by his counsel. I have been acquainted with him about,—well, since along in May. I have been in his store off and on since that time. I became acquainted with him more familiarly along in June, the first part of June. I saw Mr. Borgaro at that time—the 9th day of June, 1927. I saw him at his store. His store is at the corner of Broadway and Meyers Street. He was in the store. I was at his store because I was detailed by Acting Chief Patrol Inspector Lee Caldwell to go up there and watch some arms that was to be delivered there at his store that morning, and that was the reason I was up there. After I was sent up there by Mr. Caldwell, I stationed myself at the Broadway Res-

(Testimony of John J. Farrell.)

taurant. With reference to his store, that is located—it is about—about a hundred feet from his store, I should judge; just across the street, and a little east—on Broadway; across Broadway, about one hundred feet southeast, on the south side of the street. While I was stationed in front of the Broadway Restaurant, I did observe something. I observed that Mr. Borgaro had received some arms from the Express Company, and that along about one-fifteen, Mr. Borgaro and two or three other gentlemen loaded this—some of those arms. As to whether those arms I saw unloaded were in containers of any kind, they were in boxes. I observed what kind of boxes *there* were in. They were boxes like those standing here when they were unloaded, going into his store, and then when they came out—I would say they were the same kind of boxes that were taken into his store. After the boxes were taken in, Mr. Borgaro left. Well, after they were taken in, I was in the store. I went in the store and was talking to Mr. Borgaro. At that time I saw the boxes. (The witness was then asked by counsel to step down and examine the boxes, and complied.) As to how many of these boxes I saw unloaded, it seems to me that there was six. I don't remember just exactly how many there were unloaded, but there was quite a number of them, those large boxes. After having looked at those boxes, I can state that [81—39] those are the same boxes that I saw in the store. At the time I saw those boxes there, it

(Testimony of John J. Farrell.)

was before the time that any of them had been removed. I held a conversation with Mr. Borgaro at that time; I went in there and bought a pair of spur straps. I did not hold any conversation in reference to these; not in reference to them. After that I went out and went up to the restaurant, this Broadway restaurant, and I waited around, and Mr. Borgaro left and later returned, about one or a little after one,—about one-fifteen, I should judge, he returned, and he took the back seat out of his car and there was another rather large man helped him load some arms into the car. They were in boxes, they were in pasteboard boxes; it seemed like they were tied together, three boxes tied together. As to how many of those he loaded, I think there were about nine. There were nine packages—nine packages of three boxes each. It seems to me I have seen the man who was assisting him before. I believe I could identify him if I were to see him. After the guns were loaded into the car, why, Mr. Borgaro throwed a canvas over the back end, over the arms, and he and another fellow—this large fellow that I am speaking of—got in the car and they started up the engine and got in and started west on Broadway, and turned to the left on Main, going south. They were two or three blocks down south and turned to the left, going east; I don't remember those streets very well. I don't remember the names of them—I wasn't very familiar with them at the time. At that time, Mr. Spence and Mr. Williams were waiting for me on Broad-

(Testimony of John J. Farrell.)

way, just west of Borgaro's store, and I had my car facing west, and when Mr. Borgaro started away, why, I started in behind him and Spence and Mr. Williams got in the car with me and we followed them, about eight or nine or ten blocks, and I don't remember how far it was, and we lost them. At that time Mr. Borgaro was driving about fifty or fifty-five miles an hour. He had a Jewett touring car. I had a Chevrolet. As to how fast we were driving in our car, we had it pressed away down, and must have been going about forty-five—as fast as it would make. While Mr. Borgaro was driving, he was—on every corner he would look back, and in between times he would look back, too, and on Main, after [82—40] we turned to the left on South Main, we could only see him turning the corners—whatever corner we would turn, we—he would be turning the other corner ahead, and he and the other fellow would be looking back, both of them until they outrun us, and ditched us at 19th Street and 6th Avenue. I saw him last on 16th—well, it was—I think it was on 17th Street; 17th and, well, it is Scott Street; it is right there where there is an intersection of Scott and another street. That is the south end of town, in reference to the courtroom. It was right over, close to 19th Street and 6th Avenue, about ten blocks from here, I think. Mr. Borgaro's store is down here (indicating), about five blocks. Before we lost sight of him altogether, we traveled about twelve blocks, the way we went, because

(Testimony of John J. Farrell.)

we went zigzag and turned back, turned on one corner and then go south and then go east, and then south and then east, and then he kept that up until we lost him entirely, and the car we had wasn't fast enough to keep in sight of him.

After that, well, we circled around to see if we could not see his dust somewhere, so we would get his bearings again, which way he went, so as to follow him, and then, as we couldn't find any way to tell just which way he went, so we came back to the office, Border Patrol Office, and told Mr. Caldwell that he had got away from us.

And then after that, Mr. Wren and Mr. Caldwell and myself came up to Mr. Borgaro's store and Mr. Wren told him who he was. At that time Mr. Borgaro wasn't in the first time, when we went there, and so—that was on the same day, in the afternoon, along about three o'clock, or three-thirty, I should judge. We came back later and Mr. Borgaro came in at that time and Mr. Wren told him who he was, and also we told him who we were. Mr. Wren asked him about those guns and arms he had in his store, if he sold them. He said, No. Asked him what he did with those he took out. He said he hadn't taken any out, and Mr. Wren said, "Well, some of the Border Patrol boys seen you take them out, and I want to know what you did with them," and he didn't seem to say much then and finally he admitted selling some, and said they took them out here on Second Avenue, I think it is, some houses out there. So Mr.

(Testimony of John J. Farrell.)

Wren said, "Well, will you show us where you [83—41] took the guns?" He said, "Sure, will be glad to take you out," so we got in the car, and Mr. Wren and Mr. Caldwell and myself and Mr. Borgaro, and rode out practically the same direction in which we went when he got away from us, toward Millville, and just the other side of Millville, southeast, or pretty nearly due east, I should judge, of Millville in a canyon, a little arroyo, and he stopped the car and said, "I delivered the guns right here," he said, "I delivered them to ten or twelve Mexicans, I believe," he said, "in a truck." There was no tracks of any truck or no footprints, foot tracks of any truck or of any men, and we had a talk with him of about a half hour. That is a single track road at that place, and if there had been tracks of a truck or tracks of men I could see it. After we had talked for twenty minutes or so, why, I got out and went around—all around in there, and see whether there was any tracks, foot tracks or any car tracks, but there was no tracks, none whatsoever, in this particular place. I think there was a further statement made there by Mr. Borgaro. He said that he had taken these guns out there, that this man came there to his place of business and wanted him to deliver them out there that he was buying, and Mr. Wren asked him if those guns was to be used for revolutionary purposes, or anything of that kind, and he said at that time that when he was delivering them, after he delivered them out there

(Testimony of John J. Farrell.)

he realized, yes, that they were for revolutionary purposes. Mr. Borgaro stated that he did not know the man who went with him, that he went with those—that he left this man with the truck and came on back. He stated that he came back by himself.

After that we came back to the office with Mr. Borgaro, and I believe Mr. Wren released Mr. Borgaro; in fact, he wasn't under arrest at all at that time. I said we left Mr. Borgaro go after we came back. I might have been present when Mr. Borgaro made further statements, but I don't recall just the particular time. I don't remember just exactly anything else that I did observe. During the month of June, I made some trips to Mesquital, with some of the other Border Patrol officers, and while at Mesquital, I seen [84—42] Mr. Gandara at that place, I believe I saw him there on the 25th of June. Mr. Hays and Mr. Wren were with me at that time. I don't know exactly what Mr. Gandara was doing at Mesquital, but he was there at the Yaqui village, there at Mesquital, and we drove up and his car was there, at a Yaqui's house by the name of Antonio; I don't know what his last name is. He was an old man—his wife was blind, I believe. We had a conversation with Mr. Gandara at that time. When we drove up, Mr. Gandara came out and shook hands with us, and Mr. Wren says, "Well, Mr. Gandara," he says, "I guess you are up against it." He says "Yes, I guess so," he says, "Will you give me a chance," he says, "to go on and speak

(Testimony of John J. Farrell.)

to my lawyers," he says, or "get in touch with my lawyers in El Paso?" and Mr. Wren told him, "No," he says, "I don't know; that is up to you. We haven't got you under arrest yet; we have got lots of time for that," he said. He went on and started telling about this—these arms and ammunition that we had got over there, and he stated to us that they all had belonged to him, that he was the one that furnished them. In reference to the arms and ammunition he was speaking about on that date, he indicated the arms and ammunition that we had gotten there. I don't know whether anything was said about the arms and ammunition before he made the statement, but I think maybe we spoke about those arms and ammunition ourselves, but Mr. Gandara voluntarily stated that he had furnished them. I do know what arms and ammunition those were that I refer to; the day before we had got a search-warrant for the place and found a good deal of ammunition and picked up arms all around the river-bed. There were a great deal of new thirty-thirty rifles and then we got a number of old rifles, too. I think there were right around twenty-five of those new thirty-thirty rifles there, if I remember. We got around twenty-five old ones, too. I believe I would be able to identify those rifles. (Witness is requested by counsel for the Government to examine rifles, which he does and resumes the stand.) These guns were found on June 24th. They were found in the river, along the river bank, over here in Mesquital, and we found

(Testimony of John J. Farrell.)
a good many of them right around in these corrals, where the [85—43] Yaquis had for their horses. That was the day before the day I stated Mr. Gandara made some statements about the guns. Those were the guns that I was referring to and not the guns that were taken up here around Millville. Those were the guns found at Mesquital.

In reference to these particular guns, Mr. Gandara said that he had given the money to a Yaqui and that the Yaqui had bought these guns from Mr. Borgaro. He said that out there at Mesquital; also said that Mr. Borgaro was quite excited over the Yaqui's testimony, over what the Yaqui told him, that Mr. Borgaro was quite excited and if it had not been for the Yaqui that we would have caught Mr. Borgaro that day with the Yaqui, that the Yaqui showed him where to go to get away from us. Mr. Gandara said that Mr. Borgaro was very excited that day that we chased him, on the day that he had those guns, taking them out to the Yaquis, and if it had not been for this Yaqui that was along with him that we would probably have caught him. And Mr. Gandara said that some of those guns were the ones that Mr. Borgaro had brought out there. As to whether Mr. Gandara made any further statement—he also went into this house, this old lady that was blind, this old Yaqui by the name of Antonio, and told them that they could have the grub that he had there; they had about fifty or sixty dollars' worth of grub in the house, that they were going to use for the expedition and he told the old

(Testimony of John J. Farrell.)

folks that they could have that grub—he would give it to them.

As to whether Mr. Gandara stated what this expedition was about, he said that if we hadn't got those arms, or hadn't picked up those arms, that he would have been gone with the Yaquis, that he was going to go personally into Mexico with the Yaquis, and was going to go that night, I believe, the night we were talking to him. He said that he was going to fight the Mexican Government; the Mexican Government had been mistreating everybody and that down there the people didn't have a chance; that they were a very selfish Government and that they were just robbing the people out of their lands and everything they had and that he was going to help these people that were in need. Mr. Gandara's statement was made voluntarily at the time, and was not subjected to any threats. He was not placed under arrest at that time. [86—44]

Cross-examination.

I did not have Mr. Borgaro under arrest at any time. As to whether we took him down to the Border Patrol place, after we had drove out there, yes, we drove on down there with him, and he was there in the office. I don't know as he was kept or not. He was down there; we took him down there. I said that between one-fifteen and one-thirty, when Mr. Borgaro went with this man and loaded the guns in the Jewett car and covered them up with canvas and started up west, that I immediately

(Testimony of John J. Farrell.)

gave chase, and I went ten or twelve blocks, and I saw Mr. Borgaro zigzag and go one block south and then one block west and a block south and a block west and south again. He was going between fifty and fifty-five miles an hour on those streets down there in the south part of town.

At the time I went in and talked with Mr. Borgaro, when I bought my spur straps, those boxes of guns were there at that time. They just looked the same as they do now, and had those "Winchester" arms and tags on them and the signs that are on there, the same tags at that time. I forget just exactly how many boxes I said, but some more. There was six there anyhow, or more. As a matter of fact, there were eight boxes there and they had these same labels on them that they have now. I knew they were rifles from the labels. I did not see them loaded into the store from the American Express Company. I had not seen them down at the depot myself before that. Then I went on back and went on watch there again at the restaurant, and Mr. Spence and Mr. Williams were down in the middle of the next block so that when Mr. Borgaro went down to Main Street, going west, he passed right by Mr. Spence and Mr. Williams. As to whether they got a better look at things there than I did, they got a good look at them. And when I came down there, they got in my car and then we started on this chase. I had seen that man who was helping Mr. Borgaro, I had seen him before—recognized him as a man I had seen before.

(Testimony of John J. Farrell.)

I didn't know him, but I knew him by sight.

I said that Mr. Borgaro took us out to where he said he had delivered these guns to the Mexicans in a trunk, and he told Mr. Wren [87—45] at that time that after that delivery that he realized that these might be used for revolutionary purposes. These are the guns that I found out there at Mesquital on the 24th of June; that is, the ones that are loose over there, lying on the floor; those are the guns I said that Mr. Gandara said he had bought from Mr. Borgaro—the new ones are—not the old ones. The new ones. As to whether I meant what I said a while ago, that these were the guns that Mr. Gandara said were the ones he bought from Mr. Borgaro,—he said the new thirty-thirty rifles were the ones. That is what Mr. Gandara said.

I haven't traded with Mr. Borgaro down there for a number of years; I believe the spur straps I bought are the only things I ever bought. I have been in the store quite often. I know that Mr. Borgaro handles rifles and shotguns and ammunition and supplies and carries on a general store there. As to whether it is quite a busy corner, I don't know whether he sells much there or not; I don't see many in there very often, but he may have a good business there. He has a good stock of goods. His store is wide open there. Broadway is one of the wide streets that lead down to Main Street. Meyers is the main business street of that part of town, and both of these streets are paved streets.

(Testimony of John J. Farrell.)

I said that I got these down there at Mesquital on the 24th of June. That was along in the afternoon—along in the evening, about five or six, or it may have been around seven; we were hunting them away after dark, to find them. And we got some of these guns there at Molino's place, Antonio Molino—that is Antonio, the husband of this blind woman—just this side of his place—to the left on the river banks, and all along that river bank we found the new guns. We would dig them up, one at a time, and the old guns, we found, I think there were twenty-some-odd, we found buried together in a big box right in the middle of a corral. Right this side of Antonio's corral. As to whether we found any guns in Mr. Felix's place, we found some right on the river bank. These houses are on the river bank, just to the left of the road. I believe one of the boys did find one in Antonio's chicken-coop; it was an old rifle that they found in Antonio's house, [88—46] in the chicken-coop. It was the next day after we got those guns down there that we had this talk with Mr. Gandara. I suppose the Yaquis must have told him what guns we had taken away. The way it happened, when we went up there he came out and shook hands with us and Mr. Wren said something like this, "Well, we have got you," in something like a joking way, and he said, "Yes." "Well," he said, "That is the way it goes," he said. As to whether it was then that he told us that he had bought these guns from Borgaro, in his conversa-

(Testimony of John J. Farrell.)

tion, he brought that up in his conversation, and Mr. Wren stated, in a joking way, kidding him, "Very well; we have got you," or something like that. As to whether he kidded Mr. Wren back, well, they smiled. He did, in the way he took it. There was a lot of kidding there. Mr. Hays was also there. He was not one of the members of the Border Patrol; he was of the Department of Justice at that time. I was with the Border Patrol at this time, during all of this time that we have been talking of. I wore the uniform of the Border Patrol. I did not have the uniform on when I bought my spur straps. I didn't have my uniform on that day.

I have known Mr. Borgaro since along in May. I came here and worked in Tucson for the Border Patrol along in March. I did not wear my uniform right along; not altogether. I met Mr. Borgaro with my uniform on. At the time I went in the store I didn't have my uniform on. At that time he did not know I was a member of the Border Patrol at the time I went in his store, I went to buy my spur straps, because he asked me where my ranch was, he did not know me. I don't believe he had ever seen me with my uniform on. He didn't know I was a member of the Border Patrol.

Redirect Examination.

We found something else at Mesquital at the time these rifles were found. We found canteens and we found about, right close to ten thousand rounds

(Testimony of John J. Farrell.)

of ammunition. Mr. Gandara said that he had bought the canteens. He said that he had bought the ammunition, too. I believe I could identify these canteens and the ammunition. We found the ammunition in sacks, some of it; some of it was found in boxes, the cartridges, tied together, five and six boxes at a time, and we [89—47] found the ammunition in cartridge belts they had made out of canvas, so they could carry it around their bodies, you know. We found a good deal of these "araches," these shoes, you know, they were, and we found some knives. All of these things were buried. Mr. Gandara did not make any statement concerning the various articles found, the knives and sandals, and so forth, just the rifles and the canteens and the grub, is all that he spoke of, and the ammunition.

(After recess.)

During the interim, I have examined these various articles. All these were the things we found at Mesquital during the time I have previously described. Jose Gandara made a statement about furnishing the new canteens and the ammunition and the canvas from which they made the belts out of.

Recross-examination.

I examined all that stuff pretty thoroughly. In my opinion there is some of that stuff that came from Mexico. That belt came from Mexico, but has been fixed, over on this side, with the canvas.

There is a lot of those old guns that probably came

(Testimony of John J. Farrell.)

from Mexico. This belt is from Mexico, but the cartridges are not. (The witness was here requested by counsel to pick out all of the articles which, in his judgment or from his knowledge, came from Mexico, as well as the guns, and to place them in a pile, which he did.) I could not identify this sack, whether it is a Mexican sack or made on this side. It is old; that is an United States sack here. There are none of these cartridges that are Mexican cartridges. I examined the different packages of cartridges; they are all United States, some of them are Winchesters and some Peters. (The witness was here asked to examine the guns, which he did and sorted the new from the old, stating the old had come from Mexico, and was then asked to examine the cartridges in the pasteboard box which Mr. Hilzinger had and see if he could identify any of them as Mexican cartridges. The witness examined the cartridges.) I could not find any Mexican ammunition there. I would not say it was Mexican ammunition. They have some that may have come from there. There is some cartridges here that looks like as if they have been used; I don't know whether they came from Mexico or [90—48] not; look like German ammunition here. I don't see any F. N. C. ammunition here—there is one—just an empty shell of the F. N. C. I don't know just what that means. I don't know where they found that pasteboard box with its contents; I think that they must have found it at the Border Patrol and they must have been put in it. We

(Testimony of John J. Farrell.)

found all that stuff in sacks, loose. These sacks and the like things were not in any of the houses there; well, some of the "araches" we found were on the outside, along the adobe wall on the outside of the house. None of this stuff was found in any of the houses there. I believe one gun was found in one of the houses. That thirty-thirty was found inside of that chicken-coop place.

Redirect Examination.

I have examined the contents of this bag. All these cartridges came from the United States. These things, this canvas here came from the United States; that leather there is a Mexican leather; that is Mexican; that came from Mexico, that leather there. The cartridges are United States, made in the United States. That is new ammunition in these belts. These belts here were made by the Yaquis at Mesquital out of that canvas. There is another belt come from Mexico, but the cartridges are from the United States. These were all buried in the ground. When ammunition is buried, it will get green like that.

I have observed and had occasion to handle ammunition—that is, caring for it—during the time I was an officer. My experience about coating on ammunition would show that when ammunition gets wet, it coats green. There is a coating comes on it and it will stick in the gun. When it is kept in good shape and kept from getting wet and dirty, why it is nice and clean. The caliber of those rifles

(Testimony of John J. Farrell.)

that I have picked out here is thirty-thirty; Winchester, thirty-thirty, carbine. There is some thirty-thirty rifles in there and some seven millimeter and Mausers, German Mauser, some Krags, some thirty-forties and I believe there is a .250 —— there too. As to the caliber of the ammunition found—we found thirty-thirty Winchester cartridges and seven millimeter Mauser cartridges and thirty-forties, that is [91—49] about all. Seven millimeter and their thirty-thirties and thirty-forties. I did not have any conversation with Mr. Gandara in reference to this canvas, only he said that he furnished the cartridges and the canvas and the canteens, and so on and so forth. In a general conversation he spoke, said that he had furnished the ammunition and the rifles and said the new rifles, I should judge, and the canteens and the canvas, and so on. I examined the canvas, the weight of the canvas out of which the belts are made and the little piece laying on top of the pile. As to what I would say as to its weight—whether it is the same piece, here is the piece of canvas (picking up another piece) they was making the belts out of. That large piece is about the same weight of canvas. [92—50]

TESTIMONY OF FRED RYAN, FOR THE GOVERNMENT.

FRED RYAN was thereupon called by and as a witness for and on behalf of the Government and was first duly sworn and testified substantially as follows:

(Testimony of Fred Ryan.)

Direct Examination.

My name is Fred Ryan. I live in El Paso, Texas. I have resided there going on five years and am sales manager for Momsen, Dunnegan & Ryan Company. As sales manager I have the handling and managing of the orders of that firm and have charge of the records. During the month of June, 1927, we received an order for ammunition from Esteban Borgaro, Jr., of Tucson, Arizona, and I have the original records relating to the order placed by him at that time. The order received from Mr. Borgaro was telephoned from Tucson by long distance telephone by Mr. Cobb to our Mr. Galbraith. Mr. Cobb is a southwestern representative for the Remington Arms Company. The telephone message was received by Mr. Galbraith, who is in charge of the ammunition and arms department. This order was filled and shipped to Mr. Borgaro of 22,000 rounds of 30–30 cartridges and 1,000 rounds of 30–40 cartridges. The shipment was made by freight over the Southern Pacific Railroad of Remington cartridges, which is the only line we handle. This is the original record, the original order made at the time the telephone message was received (Here the order was offered and introduced in evidence.) I don't think that I could identify any of the boxes that left our house by any markings on the order. I imagine that it would go out like just any other shipment in the Remington case. We do not put any number on the boxes unless it is an order that calls for the

(Testimony of Fred Ryan.)

order number to be put on the case, which occurs occasionally where organizations have their own order number and request us to put it on the case. Otherwise we just put the address and the name of the firm to be shipped to and ship it. If I saw the cases I don't know whether I would be able to determine whether they were shipped by my firm.

Mr. Borgaro has placed other orders for ammunition with my concern.

There are no other orders in my files from Mr. Borgaro as large as this order. There is one order I think for 1,000 30–30 cartridges. There is another order for one tenth of a thousand of 30–30. [93—51]

Cross-examination.

There was one order placed for $850.00 and the amount of the other order was twenty-three thousand—I think it was approximated, at our credit department at about $1,200.00. All these orders that I have mentioned as coming from Mr. Borgaro at my house were in the regular course of business. We have always had an account with Mr. Borgaro, that is, not always, but for quite awhile. The shipments were all made in the regular course of business by freight. The boxes were marked Winchester or Remington, or whatever they were, cartridges. No effort was made to conceal them in any manner, shape, or form and Mr. Borgaro's name was on the boxes. [94—52]

TESTIMONY OF A. E. BROWN, FOR THE GOVERNMENT.

A. E. BROWN was thereupon called by and for and on behalf of the Government and was first duly sworn and testified substantially as follows:

Direct Examination.

My name is A. E. Brown and I live in Tucson. I have lived here seven years and am assistant cashier of the Southern Pacific Railroad which position I have occupied about four years. I was on active duty during the month of June, 1927. I am not acquainted with Esteban Borgaro, the man sitting by his counsel there. As assistant cashier of the Southern Pacific Company I have under my control records showing shipments received by the Southern Pacific Company. I have the records here relating to a shipment consisting of 23,000 rounds of cartridges consigned by Momsen, Dunnegan & Ryan Company of El Paso to Esteban Borgaro of Tucson, Arizona. This is the original record showing the shipment of twenty-three boxes of small arms ammunition. This is a receipt for delivery portion of the freight bill. (At this point for the purpose of saving time defendant's counsel admitted as having been proved that said 23,000 rounds of ammunition was received by the Southern Pacific Company at their Freight Depot at Tucson, Arizona, was delivered by the Southern Pacific Company to the Fickett Transfer Company at the request of Mr. Borgaro and delivered by the said Fickett Transfer

(Testimony of A. E. Brown.)

Company to Mr. Borgaro's place of business in Tucson, Arizona. It was further admitted by defendant's counsel at this time that said shipment of 23,000 rounds of cartridges was fully identified by witness A. E. Brown and by the driver of said Fickett Transfer Company.) [95—53]

TESTIMONY OF C. S. FARRAR, FOR THE GOVERNMENT.

C. S. FARRAR was thereupon called by and as a witness for and on behalf of the Government and was first duly sworn and testified substantially as follows:

Direct Examination.

My name is C. S. Farrar. At the present time I am living at Casa Grande. [96—54]

During the months of May and June, 1927, I was stationed at Sells, Arizona, at the Indian Oasis. I am patrol inspector in the Border Patrol, Immigration Service. I have been connected with that ever since the Border Patrol was organized. That was about four years ago, I guess, going on four years. I was on duty as Border Patrolman during the months of May and June, 1927. I know Mr. Gandara, who is sitting here. I seen him in June, 1927. The first time I saw him was here in Tucson. I did not have a conversation with Mr. Gandara at that time. Not at that time. I have, later. I don't know whether in August or September, I talked with Mr. Gandara out at Sells, Arizona.

(Testimony of C. S. Farrar.)

He made a statement at that time. That was at Sells, Arizona. I believe it was in September—I would not be positive. There was present Mr. Gandara and Mr. (?) and another fellow, a writer for the "Saturday Evening Post," was there in their car, and myself and I don't know who else was around the store there. We talked about different things and I asked him about this case here and he said, "What could I do? They caught me." That is all he said about it.

I know where Mesquital is located. I have visited Mesquital. The first time I had occasion to be down there was in June, the 23d. My purpose in going there was looking for arms and ammunition. I found some. We found, I should judge, about forty—between forty and fifty rifles, I don't know which—I don't know and I don't remember the number of shells, but quite a number of them. The shells and rifles were found within a radius of a few feet of these Indian houses down there, Antonio Molino and Feliz and Juan Alvarez, I guess his name is. They were buried in different places, around in the corrals and yards and different places, along the edge of the river. (The witness was here asked by counsel to examine the rifles and the other stuff there, which he did.) These are the rifles and that is the equipment, and those boxes—these rifles and all this equipment here, these belts and cartridges and cartridge belts and this stuff in these sacks, those canteens over there, were all found down there. These boxes and this box (the little

(Testimony of C. S. Farrar.)

one) I don't know anything about them; I never saw them. I did not talk to Mr. Gandara about any of these [97—55] things that were found at Mesquital. As to where the new guns were found and where the old ones were found, they were buried in different places there, some new ones and old ones. Two of them were buried, a single rifle in a place, wrapped up in some canvas—burlap—and the rest of them, all were buried collectively; there probably would be four or five buried in one place and I believe sixteen in one place, and the rest of them were buried two or three in a place and some had only one in a place. Some of the new rifles and the old rifles were together. It was kind of an excavation made there, with some boards laid over it, and then dirt and stuff throwed over the top of these boards, all buried down in there together. They were all buried. The ammunition was buried too. The canteens were found in different places there, buried.

I am not acquainted with Mr. Borgaro; I just know him. I never saw the defendant Gandara at Mesquital at any time. I am not acquainted with Chito Valenzuela. I have never had any conversation with Mr. Gandara in reference to Chito Valenzuela. The ammunition and the guns that we recovered there were brought to the Patrol Headquarters down here. They were checked there and left there until brought up here. They were locked up.

(Testimony of C. S. Farrar.)

Cross-examination.

None of these rifles were found in any of the houses there. None of the ammunition. None of the goods at all, none of this material, was found up there. Nothing but a lot of provisions was found in a house. They were buried near the houses of Antonio Molino and Feliz and Alvarez. Some of the guns were wrapped up in burlap or canvas; some of them were buried in holes with boards over the top; the others were just buried in the ground, no boards over them. Most of them were wrapped up. [98—56]

TESTIMONY OF JOE CURRY, FOR THE GOVERNMENT.

JOE CURRY was thereupon called by and as a witness for and on behalf of the Government and was first duly sworn and testified substantially as follows:

Direct Examination.

My name is Joe Curry. At present I live at Amado and during the months of May and June I lived at Sells. I am a patrol inspector and have been such almost two years and was acting in that capacity during May and June, 1927.

I am not acquainted with Jose Gandara; nor am I acquainted with Esteban Borgaro.

I know where the village of Mesquital is; it is on the Santa Cruz River, about four miles south of Tucson.

(Testimony of Joe Curry.)

I had occasion during either May or June, 1927, to visit Mesquital. I went out there with Patrol Inspectors Farrar and Farrell and Murchison to make a search for arms and ammunition.

We found a number of guns, lots of ammunition and canteens, knives, cartridge belts and Yaqui equipment of all kinds. I believe there were somewhere near fifty guns; there may have been sixty—I don't remember the exact number. There were around twenty or twenty-five thousand cartridges. I don't remember just how many—several sacks full and boxes and several— Oh, a big load of that. The majority of it was found buried alongside of those houses, buried on the edge of the river. We would find a gun buried here and the ammunition there, and most of it was pretty well scattered along that river edge. Some of the guns were buried together in places; sometimes there would be only one gun and sometimes two; and then there were twelve to fifteen buried in a place, and then others were buried within a few feet of each other. I would state that the stuff down there (indicating), guns, canteens, etc., is the same stuff that we found at Mesquital. As nearly as I can remember we found it the day before San Juan's Day, the 23d of June.

(The witness was not cross-examined.) [99—57]

TESTIMONY OF JOSE ESTEBAN RIVERAS, FOR THE GOVERNMENT.

JOSE ESTEBAN RIVERAS was thereupon called by and as a witness for and on behalf of the Government and was first duly sworn and testified substantially as follows:

Direct Examination.

My name is Jose Esteban Riveras. I am a Yaqui. I live at the town they call Bacum. Bacum is below Copra. I lived at Mesquital for a long time. As to whether I was living there on San Juan's Day, on the 10th of May, I came down here. I was at Mesquital on San Juan's Day. That is this year.

I know Jose Gandara. I only know Bishop Juan Navarette by sight. I saw Jose Gandara at Mesquital. That was on San Juan's Day. He was only talking there; we were listening to him. He says he wanted to go down to the river—the Yaqui River. He said nothing more about rifles or ammunition than he brought some ammunition to Mesquital. He talked there, but I am a Yaqui; I cannot understand Spanish very well. I understood some words of what he was saying. He said that he was going with the Yaquis to the Yaqui River; that is all that I heard. As to whether he said anything about guns or ammunition, he said something like that, to take it to the Yaquis. I have seen Bishop Navarette, the man who is sitting there. I saw him at Mesquital, and during the night.

(Testimony of Jose Esteban Riveras.)

Somewheres along about ten o'clock. Gandara came to Mesquital with him. Bishop Navarette said something to the Yaquis. He was talking about making peace and living quiet with the Yaquis. He wanted to help us, help the Yaquis to go there and live peaceable, he said.

Bishop Navarette said something to the Yaquis about guns and ammunition. I understood a little what the Bishop said when he talked about guns and ammunition. I understand that word that he said, that Gandara was going with the Yaquis to the Yaqui River. That is all that I heard.

I don't know Esteban Borgaro, the man who is seated over there. I have never seen him before.

Jose Gandara would come to Mesquital, I cannot say how many times he came there, but he was coming there. He came many times. [100—58]

Cross-examination.

I came to the United States the last time on the 10th of May. I remained down in the Yaqui Valley for some time. I remained there the last time eight months. I was fighting down there. Five men came back to the United States with me in May—only one family. And we were armed at the time that we came across. (The witness was asked by counsel to look in that bunch of old guns and pick out the guns that they had, if he could, and he replied:) My rifle, I throwed it away because it was too old.

I was born down in the Yaqui country. During

(Testimony of Jose Esteban Riveras.)

the course of the last ten years I have been going and coming all of the time. I would go down to the Yaqui Valley and fight a while and then come back to the United States, get some money, provisions, ammunition and rifle, and go back and fight some more. Only two times, I did that. I went the first time the year before last. I have been in the United States for twenty-eight years. I am thirty-two years old.

About eight or ten months ago I went down there again, when we hear there was peace down in the River Yaqui, I was working here and I live here and I went down to the Yaqui. As to whether I started fighting when I got down there, I was working for them farmers down there and when the revolution started I remained down there for a month. As to whether, during that month, I fought with my people against the Mexican government, I only went down there with my family and I was working to provide for my family, and then I came back with my family to the United States. After I brought my family here, I never went back to Mexico no more; we came back here in May. There was a revolution down there at that time, when I left the Yaqui country. I had been fighting with them one month only. Five other men came with me. They are Yaquis. They had been fighting down there against the Mexican government. They were coming up to Tucson to work, and they were going back there again to fight. I was not going back with them because I was living here.

(Testimony of Jose Esteban Riveras.)

The meeting was held at Molino's house, there was some at Molino's house. I was with Francisco Feliz, when I saw the people coming over there. As to whether I was living with Francisco Feliz, he is my [101—59] uncle. I am related to Antonio Molino. All the Yaquis are related to one another. Antonio Molino is my parent, because he is a Yaqui, As to whether he told me what to come here and say, we came here with him. We only come with him. He didn't tell me what to say here. As to whether I talked about the case with him at all, Antonio Molino, the people was over there and they had their meetings over at Antonio Molino's—that is all that I know.

As to how many meetings I went to out there, either at the house of Molino or Francisco, I was at the house of Francisco Feliz when the people would come there. The people would come to Francisco Feliz was the Yaquis that come from the Yaqui River. Yoris did not come there, nothing but Yaquis. The priest came to Francisco Feliz's house and he remained there just a little while and then he went away again. It was dark that night, it was late in the night and I was asleep and I didn't see anything. I didn't hear anything, only what I said. I was asleep. This speech was not made inside of a house, his talk on the one side of the house, and there were no lights there. I never saw the Bishop before in my life, and I did not get a look at him that night, I did not see him. As to whether I know this is the gentleman who was there that night,

(Testimony of Jose Esteban Riveras.)

which one? This one? (Indicating.) Yes, he was there (indicating Mr. Wren). This man would come there. He would make no speeches. He didn't make a speech there too—wasn't saying anything. He just came there, was all. I heard the Bishop say that word only. He said that he wanted to make peace for the Yaquis because the Yaquis had been suffering for a long time. He said that he wanted to make peace, to live happy. That is all.

It was Gandara who said they were going to take arms and ammunition down there; it wasn't the Bishop. He was going down there with the Yaquis, when they put on their araches and started over there he says. That wasn't Gandara. I heard him. As to who it was, only one went—he says no one went back there.

As to whether I was there at meetings where Alfonso de la Huerta came there and made speeches also, he came there very drunk and he had a gallon of mescal and he would pass it around, trying to invite [102—60] the Yaquis to drink some of that mescal, and they refused to take a drink. He talked a little, but he couldn't talk very much, because he was drunk. There was some man came there with him that I did not know. They were sitting in their machines. They never got off of their car. Alfonso de la Huerta remained sitting down there. The Yaquis did not want to talk to him because he was drunk. And he told the Yaquis that he was going to give them arms and ammuni-

(Testimony of Jose Esteban Riveras.)

tion; he talked something like that there, but the Yaquis did not want to have anything to do with him because he was crazy drunk. As a matter of fact he did not send these canteens out there. Gandara brought these out there. He brought them out there the first time. Gandara told us that he wanted to go back with us Yaquis to Mexico. All the men that he could gather around there were going with him, and they were all the Yaquis who had come up from Mexico, who had been fighting there before. I don't know the day or the date when the Bishop was out there. When the Bishop came there, I was asleep, and the next morning, when I woke up, these people like Antonio Molino and Francisco Feliz told me that the Bishop had been there and told me what he said.

Redirect Examination.

As to whether I was awake while the Bishop was there, I heard a few words of what he said. I was awake some of the time while he was there, and I heard him talk myself, a little.

As to whether I told Mr. Hilzinger that I heard Alfonso de la Huerta make a speech down there, he didn't talk anything. I don't think I heard him say anything about the Bishop. There was about nine Yaquis at Mesquital while de la Huerta was there. There were no Mexicans there.

Recross-examination.

As to whether I am related to Guadalupe Flores, my uncle, he is only an acquaintance of mine. Fran-

(Testimony of Jose Esteban Riveras.)

cisco Feliz is my uncle. As to my telling you a while ago that when the Bishop came I was asleep, yes, I was asleep, but, he said, I heard a few words that he talked about. I heard it in my sleep. I heard him when he was talking; I [103—61] didn't get up, but I heard him when he was talking; I was lying down. I was outside the house; I was on one side of the house, on the ground. All that I heard is that the Bishop said that the Yaquis had been fighting down there for a long time and he wanted to make peace, and he wanted to send Gandara down there with the Yaquis. Gandara is the one that brought the ammunition there. The Bishop did not say anything about ammunition or guns, that is all he said, what I have told you.

Redirect Examination.

The last time I saw Jose Gandara is the time he came to Francisco Feliz's house. That was in June.

TESTIMONY OF JESUS RIVERAS, FOR THE GOVERNMENT.

JESUS RIVERAS was thereupon called as a witness for and on behalf of the Government, and was first duly sworn and testified substantially as follows:

My name is Jesus Riveras. I am a Yaqui. I live here. I have lived in Mesquital. I lived there some time ago. I lived in Mesquital during the months of May and June of this year.

(Testimony of Jesus Riveras.)

I have seen Jose Gandara, the man who is seated there, at Mesquital. One time that he came there I saw him. That was after San Juan's Day. He talked to the Yaquis. He talked to the Yaquis and told them he wanted to help them and take them back to the Yaqui River. I only heard those words that I have just said, because I was far away from him at the time.

I have seen Bishop Juan Navarette, the man who is seated back there, at Mesquital. I saw him in the night-time. He talked to the Yaquis at that time. He also wanted to go with them down there. That is all that I heard. As to whether he said anything about guns and ammunition, only the ones that they brought there when they came, he says, that is all the guns and ammunition I saw. Gandara brought them down. Gandara told the Yaquis that the arms and ammunition were to have war over there on the other side, with the Mexicans. I didn't count them, but there was only a few Yaquis there at Mesquital when the Bishop talked to them.

Cross-examination.

I am eighteen years old. I know Francisco Feliz. He is a [104—62] relation of mine, and I was living in his house. I know Antonio Molino. I know Guadalupe Flores. As to which one of those three men it was that told me to come here and say that the Bishop said that he was going to lead the army down there, they didn't tell me anything. As to what the Bishop said, I didn't hear

(Testimony of Jesus Riveras.)

anything, I just saw him. I was not quite a distance away when the Bishop came there that night, I was at the house. I was about as far as those men are. I just saw him, I didn't hear anything he said. I didn't hear him.

Redirect Examination.

I said that I was about as far away as those men when the Bishop was talking. I mean the men on this side of the railing; that would be about fifteen feet. I heard the Bishop talking a little, and he was talking in Spanish. He was talking a little loud. He was talking to those men who were there, but he didn't count them. I could hear some, but I couldn't hear him very well. I heard some of the things that the Bishop said. I heard him say something about rifles and ammunition.

Recross-examination.

As to what I meant when I told you, a few minutes ago, that I did not hear the Bishop, I don't speak Spanish, I heard a little that the Bishop said, that he wanted to take them to the Rio Yaqui. The Bishop said that he, himself, was going to take the Yaquis down to the Yaqui country and fight the Mexican Government, that is what I mean, and he was going to lead the men that were there that night, and they were going to start out that night, and they were going down to capture Nogales, and the Bishop said that, and then he said they were going down to capture Hermosillo, and then they were going down to Guaymas, and after that we

(Testimony of Jesus Riveras.)

were all going to take a boat and sail into the city of Mexico. I don't know what we were going to do after that, we were just going there. He said he was going to capture Calles and hang him, and we were also going to get Obregon and do the same thing, and after that I don't know if the Bishop was to become President of Mexico. He didn't say that.

I came to the United States in May. I have been fighting [105—63] down in the Yaqui country, and I came up with my father, Jose Esteban Riveras; there were many fighting down there before. I had been fighting for about a month and we were coming up here to get ammunition to go back there and fight. I had been fighting with the Mexicans just a little and then I came with my father. As to whether I am the boy that killed General Armenta, I think there were others, not myself. I was in that battle and I have taken a few shots at the Mexicans myself. I had a gun with me. I cannot pick out the gun, in this bunch of guns that have been identified here as the gun that I brought back with me from Mexico. I don't see it there.

I saw Alfonso de la Huerta out there at Mesquital, and he came out there one night and made a speech and the Yaquis agreed to go back to Mexico then with him. Alfonso de la Huerta was the man who told them he would give them the arms and ammunition.

Redirect Examination.

When Alfonso de la Huerta talked to the Yaquis,

(Testimony of Jesus Riveras.)
he said something about the Bishop. He said that he would take them to Mexico; he said that he would take the Yaquis to Mexico. As to what he said about the Bishop, he spoke, but I could not hear him very well. He said something about Gandara. He said that Gandara would go with them to the mountains.

TESTIMONY OF FAUSTINA OLIVAS, FOR THE GOVERNMENT.

FAUSTINA OLIVAS was thereupon called as a witness by and for and on behalf of the Government and was duly sworn and testified substantially as follows:

My name is Faustina. I am a Yaqui. I live at Rio Yaqui. I have been in the United States some time. I was not living in the United States about San Juan's Day. I was living in the United States before that time. I have never seen that man (indicating Mr. Esteban Borgaro). I have never seen him before. I never saw him. I was living at Mesquital before San Juan's Day. I saw some guns or ammunition down there. I saw somebody bring some ammunition to Mesquital. I know who brought that ammunition down there. That man there brought it (indicating). There was somebody with him. There are many here, I don't know exactly who. When that man brought the ammunition down, he took it to Silas'. I saw somebody bring some guns down. The man [106—64] brought the guns. He brought them down in the

(Testimony of Faustina Olivas.)

machine. He took them over to Silas'. He took them to Mesquital. I know whose house he took the guns to. To Silas'. That was before San Juan's Day. He carried the rifles to Mesquital in the machine. There was no one with him. He took the rifles out of the machine. Silas is a short man. He is a Yaqui. I don't know his other name. He is a middle-aged man. Silas is his Yaqui name. It was night and I could not see which man sitting down it was took the rifles down there. It was at night when he brought the rifles down there in the machine. I saw rifles brought down there just once. I do not know how many rifles this man brought down. As to whether they were old rifles or new rifles, they were mixed. They were packed in boxes, in pasteboard boxes. There were various, several pasteboard boxes. Silas lives in Mesquital. I know where the house of Francisco Feliz is. As to which direction it is from Francisco Feliz's house, north or south, it is where I live. I live in the same house. I live near Silas. I know Antonio Molino. As to how far Silas lives from his house, it is the same man. And I saw this man deliver the rifles to Antonio Molino's house. The man who brought the rifles down was a Mexican.

Cross-examination.

The Mexican did not come around at night. I don't remember when—it was in the day time. As to what I meant when I said they came at night—I forgot. That is all I forgot. I didn't notice very well if the Bishop, who is standing up for identifica-

(Testimony of Faustina Olivas.)

tion, brought the ammunition. I did see the man that brought the ammunition, but I was busy and I did not notice him. I could not identify him now. That man, Antonio Molino, did not go out and help unload the rifles; he was not there—he was busy. He was over quite a way from there, a quarter of a mile from there, working. And Antonio Molino was not there at all when those guns were delivered, that is the truth.

Redirect Examination.

Antonio Molino returned to his house that day in the afternoon. [107—65]

TESTIMONY OF JOSE JUAN SANCHEZ, FOR THE GOVERNMENT.

JOSE JUAN SANCHEZ was thereupon called by and for and on behalf of the Government as a witness, and was duly sworn and testified substantially as follows:

Direct Examination.

My name is Jose Juan Sanchez. I am a Yaqui. I live here. I know where Mesquital is. I have lived at Mesquital. I have lived there at other times, during peaceful times. I was living at Mesquital on San Juan's Day. I don't know this man seated there, this man with the light suit. As to whether I ever saw him at Mesquital, one night they were at Mesquital but I didn't know who they were. There were two of them at Mesquital that night. I do not know who the other man was. He was a priest. As to whether the priest said anything to

(Testimony of Jose Juan Sanchez.)
the Yaquis, he made them make the sign of the cross. He didn't say anything else. He also said to the Yaquis that he was going to help them so they could go back to their lands at the Rio. That was all that he said. As to how he was going to help them go back to their lands, he said he would give them arms and ammunition. I have never seen that man before who is sitting by those boxes (indicating Bishop Navarette).

Cross-examination.

As a matter of fact, I never saw the priest that night, myself, at all, and I did not hear him say a word.

Redirect Examination.

As to what I meant when I told you that a priest had talked to the Yaquis; at night when he came. I did hear him talk.

TESTIMONY OF JACINTA FELIZ, FOR THE GOVERNMENT.

JACINTA FELIZ was thereupon called as a witness by and for and on behalf of the Government, and was duly sworn and testified substantially as follows:

Direct Examination.

My name is Jacinta Feliz. I live over at Manning's ranch. Mesquital is there. I have lived there a long time, since I was a child. As to whether I was living there in the months of May and June of this year, I have always lived there.

(Testimony of Jacinta Feliz.)

I know Jose Gandara. I don't see him now. I don't see him. [108—66] As to whether anybody has come down to the town at Mesquital in the last few days, only those who are living with them. Gandara was there. I had not seen him there before until the people started to come. I don't know how many times I have seen him at Mesquital, altogether, because they were with the men and they were home.

I have never seen the man seated by the boxes before (indicating Bishop Navarette). I have seen that man before who has his hand over his mouth. He is Gandara. I had seen him at Mesquital before. I don't know what he was doing at Mesquital—he was with the men. As to who was the man that was there with Gandara, some of the men who were there. The men were doing nothing, those that had come from over there.

I have never seen the man seated back there, with the blue suit on. (Indicating Mr. Borgaro.)

Gandara was down there a few days ago at Mesquital, when there were people there. I don't know what he was doing there at that time; he was with those people. He didn't talk to us. [109—67]

TESTIMONY OF G. V. HAYS, FOR THE GOVERNMENT.

G. V. HAYS was thereupon called by and as a witness for and on behalf of the Government and was first duly sworn and testified substantially as follows:

(Testimony of G. V. Hays.)

Direct Examination.

My name is G. V. Hays. I was engaged as an agent of the Department of Justice for a little more than three years, and was so acting during the months of May and June of this year. I am acquainted with Jose Gandara. He is the gentleman sitting next to Mr. Barry, his counsel. I am not acquainted with Esteban Borgaro.

The first time I ever saw Mr. Gandara was in El Paso in the Department of Justice office, probably along the first part of June. There was present Special Agent, John K. Wren and Special Agent in Charge, R. H. Colvin. Mr. Gandara had been requested by telephone to come to the office, and in answer to the summons came up there. He was asked what connection he had with a shipment of arms and ammunition at Nogales, Arizona, and at that time he said he had no connection with those arms that were in Nogales and he was further informed by Mr. Colvin that some information had leaked out that he was connected with certain revolutionary activities, and he was warned by Mr. Colvin at that time to be careful what he was doing.

I next saw Mr. Gandara some few nights after that, I don't recall just how many, but it was in the Union Depot at El Paso, Texas, on the 23d of June, as I remember now. Mr. Wren and myself were together when we met Mr. Gandara there. We asked him where he was going, and he said that he was on his way, he thought, to Phoenix, but he might get off the train at Tucson. After we got on

(Testimony of G. V. Hays.)

the train, we had a very lengthy conversation, Mr. Wren, Mr. Gandara and myself. Mr. Gandara gave us a rather long statement about conditions in Mexico. My recollection is that he said the Mexican government was corrupt and that he was in sympathy with any movement opposed to that government. He told us also that he had attended a meeting of Yaqui Indians south of Tucson at which one, Alfonso de la Huerta, was present; that he, Mr. Gandara, hid himself and his presence was [110—68] unknown to de la Huerta, and he heard himself discussed at this meeting and that the discussion was not favorable to him, but that Mr. de la Huerta did not remain there long, and after de la Huerta left, Mr. Gandara came out of hiding and had a talk with the Indians himself. That is the substance of what he told us; of course, the thing was gone over and repeated several times during the course of the conversation.

I next saw Mr. Gandara the following day, in the evening, at the Yaqui village of Mesquital, about six or seven miles south of Tucson. Mr. Wren and myself were together at that time, and there was also one of the members of the Border Patrol. At that time Mr. Gandara made a statement. He said, almost in these words, "Gentlemen, I was expecting you." Mr. Wren spoke to him aside first and then later we had a talk there together at the house of Antonio Molino, one of the members of the village down there, and Mr. Gandara at that time said that he was equipping the Yaquis for an ex-

(Testimony of G. V. Hays.)

pedition against Mexico, that he was leading this expedition himself, and he said further that he had personally brought ammunition there with which to help arm these Yaquis, and provisions which they were to take on the trip; that he was going with the expedition. They were all going on foot and that he had been hiking in the hills for the past two or three months, to condition himself for this long hike to Mexico; that they would cross at the Border, wherever they could get across, and were going on down into the Rio Yaqui country, join up with the Yaqui Indians in Mexico and when they got there, why, business was going to pick up right away.

Gandara said they had made plans to leave on the 18th of June and that some of the Yaquis out there demurred on going on that date because they wanted to wait for some more members of the tribe, and that they had next set the date of June 25th to go and would have gone if the expedition had not been broken up. He made no further statement right at that time. He did not make a statement at that time or in my presence as to where he had or was to secure his arms and ammunition, but he said that the ammunition which had been [111—69] recovered had been brought there by himself, but he didn't tell me where he got it. He didn't state where he got it.

I next saw Mr. Gandara the morning after that, at the headquarters of the Border Patrol. We asked him, the evening before, to come there the next day, so he said he would come anyway. We

(Testimony of G. V. Hays.)

told him, if we would not lock him up that night and to come down there the next morning, and that is where we next saw him.

As to who was present at that time, it would be hard to say. Mr. Wren was there and I was there, and Mr. Gray of the Border Patrol was there; there was several of the Border Patrol members there, were in and around the building all the time.

He said very little at that time beyond what he had already told us.

After that I saw him on several occasions. He was over at the Commissioner's Court and also I saw him in the jail after he was bound over by the Commissioner. I did not have any conversation with him at the Commissioner's Court. I talked with him in jail. As close as I can remember that was the 27th—26th or 27th of June. Mr. Wren and I went down there together. At that time we spoke of the arms and the ammunition and Mr. Gandara said that he did not take any guns out there personally, but that it was safe to say that all the guns that were out there had been sent there at his orders and instructions; he also spoke of one Chito Valenzuela as having fled from the officers some time before that, and that he himself had hidden Valenzuela for a day or two, thinking that the officers were still looking for him. I do not know if Valenzuela was ever apprehended.

As to whether I had any further conversations with Mr. Gandara, we talked at length and Mr. Gandara said—this conversation was held in the

(Testimony of G. V. Hays.)

Pima County jail about the 26th or 27th of June. I do not recall exactly. It is the same conversation I have just related. The conversation, what I mean, it went further than what I have stated so far. Everything that he said at that time was that he had been approached by certain parties before this, probably [112—70] in April; that these other parties wanted to join in with him and assist him and he first started to deal with them and then found out later that they were trying to double-cross him and after that he would not take them into his confidence any further on what he was doing. He said those parties were Gabriel Rendon and a Yaqui named Juan Frias. After that I had no further conversations at length with Mr. Gandara. I have seen him and spoke with him on numerous times since, but not to any great extent. During his conversations with me at that time he mentioned Mr. de la Huerta. He said that de la Huerta had attended this meeting I spoke of a moment ago, at which Gandara was hidden, and that de la Huerta at that time told the Yaquis assembled there that Gandara wasn't the man for them at all—that he, de la Huerta, was the man that they should fall in with and he tried to convey the impression that Gandara was the wrong man for them to deal with.

Cross-examination.

At the first conversation, in El Paso, that I stated we had, Mr. Wren was in the office at the time. As

(Testimony of G. V. Hays.)

to whether he was present at all the conversation, I wouldn't say that he was. There was several rooms in the office and I would not say Wren was in the same room all the time. I was there practically all the time; I may have left the room before the rest of them. That interview did not last two or three hours. It didn't last, I don't suppose, an hour, as I recall it now. As I remember, I would say less than an hour. Mr. Wren was present at all the conversation on the train. Mr. Gandara invited us to eat there with him on the train. We went into the dining-car and had a discussion during the meal—over the table, and before and afterwards. And during that conversation, or these conversations, the Mexican question was discussed. Mr. Gandara, as I remember it, said he was in sympathy with any movement that was opposed to the Mexican government. As to whether he said he was in sympathy with the Yaqui movement, I would not say that he called it the Yaqui movement, or not. He said he was in sympathy with the Yaqui cause, he was for them. [113—71]

As to whether Mr. Gandara said what cause, in connection with the Yaquis, he explained to us that the Yaquis had been mistreated by the present Mexican government, had had their lands taken away from them and this, that and the other. He spoke of messengers having been passed back and forth between here and Mexico. He did not say in what numbers. I don't think he said where they were. He said there had been some of these mes-

(Testimony of G. V. Hays.)

sengers or Yaquis in Tucson; that he was in touch with the situation through them—the Mexican situation, and the Yaqui situation. The Yaqui situation is what I took it to mean. As to whether he said the Yaquis were in uprisings in Mexico, well, they were in one sense of the word, I suppose. I knew that, myself. He practically said that bodies of messengers were coming to the United States and going back to the Yaquis and coming to the United States and going back continually. At that time he did not say that he hoped to join them at this time. As to whether he said that any time, he said that if conditions reached such a point that he would be permitted to go down there, that is the impression I got from his conversation, but he never intimated at that time that he was going to lead any of them down there, or anything of the sort. As to whether he said to me and Mr. Wrenn that if he were permitted to go he was going, I say, that is the impression I got from his general conversation, but I would not say that he said so in those words. It seemed that with Mr. Gandara, the idea that I got, was any way to get there, that is all he wanted, was to get down there and get busy. He did not say that he was going to take any Yaquis that had lived in Tucson or the surrounding country for some time. He didn't say that he was going to take anybody at that time. He didn't say he was going to lead anybody then. Afterwards, he said that. He used the term "expedition." I think he used that term. As to

(Testimony of G. V. Hays.)

whether he said he was going to lead an armed expedition against a friendly power, he did not say that—he said he was organizing the Yaquis into an expedition, or words to that effect, of which he was to be the leader, or the head. That conversation was after we found him at the Yaqui village. He said he was organizing all the Yaquis he [114—72] could get hold of. He said that those enemies of his, whatever you might term them, they run off with some of his Yaquis. In other words, he told me that there were apparently two factions endeavoring to get in with the Yaquis, the de la Huerta faction and himself, but he felt that he had the edge on the de la Huertas and stood in with the Yaquis very much better. But there were two factions who were trying to sway the Yaquis to their side—all of the Yaquis, as I understood it. As to whether I understood that the Yaquis who had lived for years in Arizona, that they were endeavoring to organize them, as I told you, at the time he talked to us on the train, I did not get that impression, but afterwards it occurred to me that it was planned to get all of them that they could and get down there. The thing he said that led me to believe this—he would say "These Yaquis," "these people" and that sort of thing. I did not think from what he said that when he said "these Yaquis" it included all of the tribes, no matter where located, but I had to assume it, because he was so positive about it. He did not say these Yaquis, these people were in Phoenix. He said

(Testimony of G. V. Hays.)

they were in the village down here. I have been to that village. There are a half a dozen or more houses there—about six houses. That is what I understood he was talking about, then, that village. As to how many Indians live there besides Indians from Mexico, I wouldn't say exactly, but I know in one small house there was twelve or fifteen of these Yaquis who claimed the same house as their residence. I didn't see how it could hold them, but they all said that was their place there. That was while we were down there. I mean in June, in the latter part of June, along about the 24th or 25th. As to how many, in all, were in the Indian village at the time I speak of, well, at the time I was down there, I saw possibly forty or something like that. I know some that were recently from Mexico there. I don't know how many of them were not recently from Mexico, there were probably twenty-one Yaquis had been brought in to Tucson who were from old Mexico, Old Mexico Yaquis, had been released and had gone back down at the time we went down there they weren't all there. As to whether some of them had gone back, they were supposedly gone [115—73] to work on positions that had been gotten for them.

In the conversation that we had in jail, when Mr. Wrenn was present, I don't think Mr. Wrenn mentioned anything about endeavoring to get rifles back for Gandara. I don't remember whether Mr. Wrenn said that "If you bought these and they are yours, we could give or get them back for you,"

(Testimony of G. V. Hays.)

but that would be if it was later proven they were his. Without stating any conclusion, that may have been said by Mr. Wrenn in my presence to Mr. Gandara, but I don't remember that it was. I would not say that it was not said to him. I do not recall that in answer to such a statement, Mr. Gandara said, "Well, they were not mine and I had nothing to do with them and I could not get them back." I am fairly sure that such a thing as that was not said.

Mr. Gandara, on the train, went into the Yaqui situation pretty thoroughly with me; the whole situation. He seemed to show a familiarity with it. I don't know as he mentioned any family connections. I don't recall that. This de la Huerta's first name was mentioned by Mr. Gandara—Alfonso de la Huerta. I do not know what became of him—only such hearsay remarks. In discussing de la Huerta, he said that he had been at a meeting where de la Huerta had advised the Indians to have nothing to do with him, Gandara. I don't think he said that de la Huerta at that meeting had mentioned any arms or ammunition. I am clear as to what Gandara said out at the Indian village, on the date that I met him there, when Mr. Wrenn and the Border Patrol Inspector were there. My statement is that he had said that he had gotten the ammunition. The way he put it was, "I brought ammunition out here." As to whether, "I brought ammunition out here" is the extent of his statement on that occasion with reference to ammunition,

(Testimony of G. V. Hays.)

well, we talked of it so much. I don't imagine that it was, but he spoke of the ammunition and then he spoke of the provisions and then he spoke of what each man was to carry when he started out. As to whether he mentioned rifles on that occasion, well, he said that each man that he was to take was to carry a rifle when he left. He did not tell [116—74] me that each one of these men had come from Mexico armed. He did not mention that. I do not know that of my own knowledge. As to whether there were no rifles mentioned on that occasion, as I remember, the question of the rifles was spoken of later. As to whether I am able to clearly distinguish and definitely say that on that occasion Gandara did not say, "I bought ammunition for some new rifles and I bought ammunition for some old rifles," I don't think he said that. I was not right there with him all the time. As I told you, Mr. Wren spoke to Mr. Gandara off to one side first, before I entered into the conversation. As to whether I was there all the time the Border patrolmen were there, he sat in the car with me when Mr. Wren spoke to one side with Gandara, so that for a few moments he could not hear Mr. Wren talking to Gandara. I would say it was five or ten minutes; it was not long. Practically all the time outside of this five or ten minutes conversation which Mr. Wren had with the defendant, the Border patrolman and I were there where we could hear. The conversation was mostly with Mr. Wren, but I asked a few questions. As to whether Mr.

(Testimony of G. V. Hays.)

Gandara was then requested to report the next day at the Border Patrol, well, he told us that he would meet us any place we designated, and I don't think we told him to come there, but he did; he was there the next morning when we returned from breakfast. To the Border Patrol. He was not taken into custody right then.

At that time I had been with the Department of Justice a little less than three years. My profession is attorney at law. As to whether I said that this man admitted in my presence that he, according to my understanding of the law, had violated the law, yes, he realized, from what he said, that he had erred. I understood that he had. I knew the law and Mr. Wren and I didn't arrest this man; we don't make arrests. As to whether a Department of Justice man never detains a man, we can ask them to come back—or something like that—but we don't serve warrants or officially serve warrants or make a return on it or anything like that. That was partially the reason we did not arrest him that day, because we are not arresting officers. [117—75] I believed that he had admitted to me that he had committed a felony. I did not make any efforts to detain him right away, because he said, "I will give you my word that I will be anywhere you want me to be," and Mr. Wrenn and I both said to him that we felt he was a man we could trust and we would let him go on his own recognizance if he would see us the next morning, which he promised to do. We re-

(Testimony of G. V. Hays.)

leased him on his own recognizance, and that is a courtesy which is not always accorded. I felt Mr. Gandara was such a man that I could so trust. I felt his word was good, and it was seemingly so. He reported in the next morning, himself. I don't think Farrar was there during any of these conversations. As I recall it, Farrar was never present at a conversation. Mr. Farrell, I think, was the boy that was with us.

Redirect Examination.

As to whether those Yaquis who came up from Mexico last spring were disarmed after they reached the United States, I never saw them with any arms at all.

Recross-examination.

I do not know that they were disarmed. [118—76]

TESTIMONY OF JOHN K. WREN, FOR THE GOVERNMENT (RECALLED).

JOHN K. WREN, being recalled as a witness for the Government, having been previously sworn, testified as follows:

Direct Examination.

I held a conversation with Mr. Borgaro at his place of business prior to the time I went out to the arroyo. As nearly as I can remember it was on or about, I think, the 9th of June. Mr. Caldwell and I believe Mr. Farrell, the two Border Patrol

(Testimony of John K. Wren.)

Inspectors were present. Borgaro said all the guns were in the store, in the back of it. As to whether I examined the cases or counted them to see how many of them there were—and, it appeared to me that there was three cases gone, that is, there was only five boxes left, or five cases, whatever you call it and three gone. What he said in reference to those five that were there—I walked into the store and when Mr. Borgaro came there about the time—I know it was in the evening I told him my business. I told Mr. Borgaro who I was, showed him my credentials and told him that some guns had been taken away from his store, and what had become of them. He said, "They are all in the store here; they are all in there; they are all there." "Well," I says, "well, now, you have been seen to go away from here with some guns, and here is the man who saw you," and I think I pointed to Mr. Farrell. He says then, "Well, I sold some of them,"—he finally admitted that there were some guns gone. I said, "Well, will you show me where you delivered them?" He said, "Yes, he would go with us," and I don't remember—we got in a car with Mr. Caldwell and Mr. Farrell and we drove south from Mr. Borgaro's store, or probably southwest and turned and went out several blocks southeast, and Mr. Borgaro, in the car, on the road, said that he did not deliver them to the house, but delivered them out to an arroyo, near some place called Millville, and then I said, "Well, you will take us to that place?" and we drove on out and across the

(Testimony of John K. Wren.)

railroad tracks, I think, and then he turned kind of north, and then showed us a hollow or an arroyo, and said, "At this point is where I delivered some guns to some men in a truck." I don't remember whether he said eight or ten or twelve men. I asked him, "Well, who was the man who was with you, delivering?" "I don't know his name." Then I asked him, "What became of this party?" and he said that he went away with—that he left him there with the men in the truck after [119—77] the guns had been taken out of his, Borgaro's car and put into the truck of the men who had received the guns, and then we drove on out kind of north and came back to town. That was in the evening. I could not say the exact hour, but it was sometime, probably between two and four o'clock. Well, we made an examination there of the ground, and I asked him where the truck was standing, or words to that effect, and he said, "There," and we looked around and could not see any tracks of a truck or car or of any men, and he said, further said that a man had been into his store, a man or two men, he said, or some men, and told him that they wanted somewhere around seventy-five or a hundred rifles and they would take, with the rifles somewhere around twenty thousand rounds of ammunition; that the man whom he was with when the guns were delivered was there at the time, and the purchaser of the rifles, or the man desiring the rifles, designated this particular man who was with him in the car at the time that he delivered to the ten or twelve men in

(Testimony of John K. Wren.)

the truck the twenty-five of the rifles, and that he was to get for the rifles around twenty-nine dollars and a half; they were carbines, they were thirty-thirty rifles; that before the guns—he had ordered the guns on that date, and a short time or about the time that these parties were in the store, which was several days previous to the time that the guns came by express, and part of them were delivered by him, and that the gentleman or the party so designated by the purchaser as to show where the guns were to be delivered, or to receive and pay for the guns, came back on several occasions, urging the delivery, or wanting the guns to be delivered, and that he had come back two or three times on the date the twenty-five—on the date that the twenty-five were delivered out at the arroyo, and when the guns came the party paid him, this agent of the purchaser paid him for twenty-five, or the amount of the number, and urged him to deliver to a place the guns. That he delivered out at this arroyo the guns, and the party was insisting all the time that he was to deliver, and he did not care much about delivering, but he had his money into the guns,—that is, his money was invested in them, that he had ordered the guns from Dunham, Carrigan, Hayden & Company, I believe, from San Francisco, and had made arrangements at the Southern Arizona Bank & Trust Company for the payment of the guns to the firm they [120—78] had been purchased from. That at the time this party came in, that is, the agent of the man who wanted the guns, and the

(Testimony of John K. Wren.)

one who went with him out there, and urged him to deliver, he thought there was something wrong about it and figured they might be for fighting purposes, and at the time of delivery, out at the arroyo, he realized that they were for revolutionary purposes.

When he made the statement that he realized the guns were to be used for fighting purposes, as I got it, as I understood it, that when he delivered them out there to the place, he realized that it was for revolutionary purposes, but yet, when this man came into the store, insisting that he deliver them, he knew or believed that there was something wrong, and that they were for fighting purposes. That is his words, as I remember, or about his words, I couldn't relate positively the exact words. He stated further that they were to take some ammunition, that he had bought or ordered a quantity but did not state the exact number of cartridges, or rifle cartridges that would probably go with the guns, or words to that effect. As to whether he stated the parties to whom the cartridges were to be furnished—well, to the same parties who—he indicated it was the same parties who had bought the guns or who had ordered the guns or who had him to order the guns. While we were out there, why, of course, we made efforts to have Mr. Borgaro to tell us who the people were but he could not, did not know the names, and I believe he said that they were Mexicans; he could not say where they lived, which way they went, or anything to that

(Testimony of John K. Wren.)

effect. He said that he left them there, that he went on with his car and left all parties there with the guns. He said when he stopped there that they came over to his car and the man that was with him got out of his car and helped this man transfer the rifles over to the truck. Several of us got out there, —I don't remember just who, Mr. Caldwell, Mr. Farrell and myself.

The first time I had any conversation with Mr. Gandara was at the Bureau office at El Paso, Texas. It was probably in the early part of the month of June, or about that, right at that time. As I recall the time and place Mr. Arthur Colvin, Agent in Charge, and Mr. Hays and myself were present. As to what the defendant Gandara said at that time —well, I would have to state as to what we first said to Mr. Gandara. I called him [121—79] up by telephone and had him come to the office, requested him to come to the office, and when he came to the office—he came some time, I believe, in the evening, —and Mr. Colvin told him that he had information that he had—was mixed up or kind of connected in a shipment of arms or ammunition at Nogales, and Mr. Colvin further advised him that he wanted to warn him that he had better watch his step, or words to that effect, that if he did not he might get into trouble over it.

I did not see him any more. Mr. Gandara lived in El Paso and I may have met him several times—I don't remember exactly; both lived in the same place. But the last time, that is, after that, Mr.

(Testimony of John K. Wren.)

Hays and myself were coming to Tucson and we met Mr. Gandara at the Union Depot at El Paso, Texas. Something was said about, "Where are you going, boys?" or words to that effect, and I believe Mr. Gandara said, "Well, I intend to go to Phoenix," or "I intended going to Phoenix, but I might stop off at Tucson," or "I will stop off at Tucson," and we both bought tickets about the same time, along that time, and we boarded the train, and later we were in the smoking-car, or the part belonging to—it wasn't in a smoker but it was some part of a passenger-car where you could smoke and read, and we had several conversations during the trip or during the time that we were en route from El Paso to Tucson. Mr. Hays, Mr. Gandara and myself were present during those conversations, part of the time, and probably someone might get up, but off and on, we were together. I don't know just how the conversation came up, but there was something said about conditions in Mexico and the Yaquis, or something to that effect. He said that the Yaquis were having a pretty hard time and that he was in sympathy with them, or any movement against the present government of Mexico. That the government was not what it should be, and then he said that his grandfather—he told me his name, but I don't remember, but he was a man who had lived in Sonora for many years—and he had been a friend of the Yaquis or had helped the Yaquis out and as I understood it, that he had been killed years ago for that cause, or some words to that

(Testimony of John K. Wren.)

effect, for helping the Yaquis. Of course, I cannot remember in detail just all the conversation about the entire matter, but it was conversation to that effect. I just stated that he said the Mexican government was no good, that it was not a good government. [122—80]

As to the next time that I talked to Mr. Gandara, well, we went to bed and it was the next day, I believe, or in the evening—I couldn't say exactly what hour, but it was some time after dinner—Mr. Hays and Mr. Farrell and myself went out to the Yaqui Village, known as Mesquital, which is located, as I remember seeing it, on the river bank out here, the Santa Cruz River. We drove up in our car and when I was about to get out, why, I saw Mr. Gandara coming from one of the houses or from that direction, and I spoke to him, and I don't know exactly—I don't remember just who spoke first, but something was said about, "Well, what has happened?" or "Joe, it looks like we have caught you," and Joe said, "Yes," and then I spoke up and said I was surprised at it, I did not think that, I believe I said, I believe, "I thought you had more sense than to mix up with those Indians." And we talked for a little while about the matter and he said, "Well, I have tried to help these people, and I intended to go with them and we would have left sooner" or "would have left a day earlier," some time a week or so before that, but something came up with reference to the Yaquis, they wasn't all ready and there was some decision made about going

(Testimony of John K. Wren.)

after San Juan's Day, or about that time. As I recall the date that Mr. Hays, Mr. Farrell and myself went to Mesquital, it might have been on San Juan's Day on the 24th of June; it was about that time.

The next time I talked with Mr. Gandara was the next day. That is, Gandara said, asked what was going to be done with him, and I remarked that the matter would have to be taken up with the United States District Attorney, that he was not under arrest, that we had no powers of arrest, and he said, "Well, I will be any place you tell me to be; I will meet you any place," and it was agreed upon, some way or another, that we would see him later, and I believe we went into the house. And with reference to the provisions, there was some provisions out there in the house of the old Indians named Molino, and we decided that that would not be seen; in other words, that what we left there these Indians could have it to live on, could keep it. We left, and the next day I met Mr. Gandara, and I believe at the Border Patrol. Mr. Hays and myself were together, and we had been down, as I said to Mr. Gandara, that we had been practically, [123—81] well, from early in the morning for a considerable time, questioning some of the Indians, a number of them who had been brought in by the Border Patrol with the arms and ammunition which had been found out there near the house of Antonio Molino, Francisco Feliz and another Indian, which I think his name was Juan Alvarez, and I told Mr.

(Testimony of John K. Wren.)

Gandara that we had released the Indians, that they would report back probably the next day or at the time they were needed, and we talked further about the time when he was to go and where he intended to go, and he said that he had been preparing to go for some time by exercising in the hills and walking, and said he intended, when he did go with them, that he was going to walk, that they had no horses. Each man was to have a gun and so many rounds of ammunition and his provisions and they would start out, if the Indians knew the route and knew the country, and would have left at night, and he spoke of the jealousy existing, in other words, of two men interfering, in other words, trying to win the Yaquis over, and he said one of them in particular was named Juan Frias and the other one was named Alfonso de la Huerta, and that Juan Frias,—no, that one of them was named Juan Frias and the other one was named Rendon, Gabe Rendon, and when he found out that they were working against him and probably would have double-crossed him, he would not have anything further to do with them. We further talked about the guns. He said the old guns were guns they had brought in, had been brought in by the Yaquis, and that the new guns were guns that really he was responsible for, but, however, he had furnished ammunition and carried it there, a good part of it himself, for all the guns that were found there and that we had not—did not find all the guns and ammunition that was there; we only found a part, that only a part

(Testimony of John K. Wren.)

had been found, that the boys only found a part at the Mesquital village.

He didn't state at that time where he secured the new guns, he did later. Well, there was a conversation—Mr. Gandara talked about some people coming down to the Yaqui village, but I believe that was on the train. I was trying to think just where that occurred, or where he said it occurred. It was on the train, I think, he said, when he told us about this affair, and then several times later it was mentioned, in the conversation the next day. It was with reference to Alfonso de la [124—82] Huerta, and the man named Rendon, coming to the Yaqui village and he, Gandara, was there, and when he recognized them and saw them, why, he kind of got with the Indians, that is, he got among the Indians—there was a number of them standing there in this particular meeting, and Alfonso de la Huerta addressed the assembly and asked if there was any Yoris there, and I have since found out that "Yoris" is the Yaqui word for Mexicans, and the Indians—I couldn't say just who Mr. Gandara said it was replied to that, but they told Alfonso de la Huerta that there was no Mexicans there, and then Alfonso de la Huerta, in his talk to the Indians, went on to say that Gandara was not the man to go with them, and that he was nothing but a boy and had—he had very little money, that he had some, but not as much as he, Alfonso de la Huerta, had or could get, and that they could go on down into Mexico with him and probably do more—that is, with him

(Testimony of John K. Wren.)

being a leader—than Gandara could do. In other words, Gandara could not help them like he could after they had reached Mexico. The party left, this party left and Mr. Gandara said he talked some to the Yaquis at that particular time.

This conversation took place on the 25th or 26th of June. It was after we—after we met out at Antonio Molino's place at Mesquital and this particular conversation that he was referring to was one that took place after we visited there, after we met at the Border Patrol Office. There was no one present except Mr. Gandara and myself; we were on our way from the Commissioner's Office to the Western Union office. He has been arrested at that time. As to what Mr. Gandara said—well, at the Commissioner's office Mr. Gandara said that he would like to send a telegram and get his clothing; or something to that effect; I know it was with reference to the telegram and Mr. Mills, the deputy marshal, said that I could go with him to the telegraph office, and I am sure it was the Western Union. Anyhow we went up there and going up there we talked about the guns, the rifles, and we brought up about who he had gotten the guns from. He told me that he got them from, he bought them from or he ordered—who he ordered them from, and he said that he had designated a man by the name of Chito Valenzuela a Yaqui Indian, to pay for and receive the guns and deliver them and take them, as he was not here in Tucson or near Tucson, at the time of the [125—83] delivery or the de-

(Testimony of John K. Wren.)

livery of part of them; that the party that he bought them from first made efforts in Tucson to get rifles here, but he failed to do it and so ordered them—he didn't tell me from where, but said they were the same rifles, part of which had been seized out at Mesquital, and that he thinks really were rifles—his, Gandara's, rifles, the new rifles. At this time I don't recall any further conversation. We went on back to the marshal's office. At that particular time he did not say so much about the ammunition. We had talked about ammunition before. That was on the same day that we saw Mr. Gandara at Molino's place and down at the Border Patrol which was on or about the 24th; I couldn't say exactly, just exactly whether it was the 24th, but it was about the 24th; it was the day we were out there in the evening.

As to what he said about the ammunition, well, out at Molino's house, Molino's place at Mesquital, and it was discussed, with reference to the ammunition, was discussed at the Border Patrol office, headquarters office. Mr. Gandara stated at that time while Mr. Hays and Mr. Farrell and myself was out there, that he had delivered the ammunition for the rifles. He did not state where he had secured that ammunition, he had—he did state that he had secured it here in Tucson, but he didn't say whose store or what place. He stated he had secured several thousand rounds, and that it had not all been found out there, that the searching parties or officers did not find all, and he said they did not

(Testimony of John K. Wren.)

find all of the guns at that time. I understood him to say there would be some ammunition with the guns, for the guns. On the 25th day of June, 1927, at the Border Patrol Mr. Gandara stated that at that time all the ammunition or guns had not been found, that they did not find all of them, or words to that effect. Mr. Hays, I think probably Mr. Caldwell was present at that time at the Border Patrol. Gandara said at that time that Chito Valenzuela had gotten away, at the time of the delivery of the guns, and that he had kind of kept—had advised him or would advise him or someone advising him—he could not say—to keep out of the way and in hiding. Chito Valenzuela has not been apprehended. At the time I talked to Jose Gandara at Mesquital on or about the 24th in the presence of Mr. Hays and Mr. Farrell he did not make any statement about the rifles that had been delivered to the house of Antonio Molino or near the house of Antonio Molino. [126—84]

TESTIMONY OF JOHN K. WRENN, FOR THE GOVERNMENT (RECALLED).

JOHN K. WRENN, a witness for the Government, being recalled by the Government for further examination, testified as follows:

Direct Examination.

I was asked on direct examination last Friday, just before leaving the stand, if Mr. Gandara had made any statement at Mesquital in reference to

(Testimony of John K. Wren.)

the rifles that had been delivered to the house of Antonio Molino, and I stated at that time that there had been no statement. That is not correct. At that time, Mr. Gandara was not under arrest. Mr. Hays and Mr. Farrell and myself went out there to see the country, as well as to visit the house of Molino and see him. We had been there and told him we would be back to his house, and when we reached the place, Mr. Gandara was there. The new rifles had been seized at that time. At that time we met Mr. Gandara there, the question came up about ammunition, provisions and guns and supplies, and he said that he was responsible for the new guns that we found there, but that he didn't handle those old guns that were found there, but he did deliver the ammunition there for both old and new. [127—85]

JOHN K. WREN, being recalled for cross-examination as follows:

I am not a member of the Secret Service of the United States. My official position is Agent of the Department of Justice and the Bureau of Investigation of the Department of Justice. It is not the Secret Service of the United States as we term the Secret Service. We generally investigate these various activities that we feel that may be tending towards violations of the United States Statutes—those violations that come under our Department. Those that come under our Department. It is pretty hard to say how long I have been engaged

(Testimony of John K. Wren.)

as such, just how long, exactly the number of years, because I can safely say that I have been with the Department since about 1912, not all the time, but most of the time. About fifteen years. Previous to that time I was a cowboy. As to whether I had had any official experience before becoming attached to this Department, my father was the sheriff of a Texas County for about twenty years or twenty-two years. I served under him a great many times and the man who succeeded him, I was his deputy for a few years. I had been a Deputy Sheriff as well as a cowboy but not for many years before I entered the Department. I could not tell you how many. I couldn't say exactly; I'd say probably from the time I was twenty, eighteen or twenty, for various times before I came to El Paso, maybe four or five years. I am fifty-one years old now. I couldn't say that I had charge of this case from its inception. Mr. Hays and myself were together practically all the time during the investigation. We have an agent in charge in our El Paso office. I worked on it. I couldn't say that I have been the one man in charge of the investigation here in Tucson and at Mesquital, because there have been several agents work on it at different times. While I was here I have been directly in connection with it at all times, myself—at times. And I went and interviewed quite a few of the various witnesses and with reference to the arms shipments, I made the investigation with Mr. Hays, and sometimes by myself. I did [128—

(Testimony of John K. Wren.)

86] not swear out search-warrants myself; not all of them, I don't think so. As to which ones I didn't swear out, I didn't swear to the search-warrants where the seizures were made out in Mesquital or that vicinity. I believe that I did sign the search-warrants before the Commissioner with reference to the seizures made at Mr. Borgaro's store. I think, the rifles and ammunition there at Mr. Borgaro's store. I did not swear out all of the warrants arresting Borgaro and those others before the United States Commissioner. I couldn't say positively that I did. As to which ones I did make the affidavit and swear to myself, I don't think that I signed the complaint of Mr. Gandara; I may have signed that complaint of Mr. Borgaro. As to Mr. Valenzuela I am not sure. There is quite a few of them. There was John Doe and Richard Roe and some others included in that complaint against Mr. Borgara. As to whether under that complaint that I swore to there, the warrants were issued under which Borgaro was arrested and Valenzuela was arrested, I don't know which Valenzuela you mean. As to the Valenzuela that had been arrested and was tried down before the United States Commissioner the man who was turned loose up here the other day and the indictment dismissed as against him and that was the man that was arrested under this complaint that I swore to up there if I could have or see the complaint I could tell you whether I signed it or not. As to my recollection of it I am not sure about Valenzuela, whether

(Testimony of John K. Wren.)

he was arrested on a complaint or not, or whether he was arrested from a *capias* from—or from a complaint, I would not say. I remember the arrest, but I am not sure whether it was from a complaint that I signed or it was taken from a *capias* on another date. As to whether, as a matter of fact, Mr. Valenzuela that was down there wasn't arrested on that complaint that was sworn out against Borgaro and the others, brought into court and tried there at the same time, on the preliminary examination, as Mr. Borgaro—he was before the Commissioner and had the preliminary trial, I think, at the same time Mr. Borgaro had. And I was present there and the United States Attorney was there, and I testified at that preliminary examination and Mr. Spence, Border Patrolman, testified on that hearing and Mr. Williams, a member of the [129—87] Border Patrol, testified at that hearing, and Mr. Valenzuela and Mr. Borgaro were bound over to the United States District Court at that hearing. So I have been interested in this transaction right from the first from the Government standpoint. I could not say I had a personal interest in seeing that these defendants are convicted. As to my official interest and the pride of my personal actions and official actions giving me an interest in the prosecution of this case and the conviction of these defendants, I cannot say that I feel any bitterness or anything like that—I don't know exactly what you mean. I talked with most of the witnesses, I think, before the

(Testimony of John K. Wren.)

matter came up; I took statements and notes and things like that. I made notes on what they said—as to what they said. I talked to Mr. Conger. I talked to Mr. Holliday after coming here, with Mr. —in the presence of Mr. Perrin, but I hadn't—I have never seen the man or heard of him before, only by his name. I talked with Mr. C. M. Orosco and talked with Mr. W. E. Jones and took his statement. As to Mr. Lee Caldwell, I talked to him but I didn't take his statement, but he didn't sign any statement or anything like that; he was present at some of the interviews. I believe Mr. Caldwell was one of the witnesses that were called and sworn here at the opening of this trial. I talked with J. J. Farrell; I didn't take any statement, only just made notes of what he said. As to whether I talked with Mr. A. G. Spence and took his statement, I don't think Spence had anything much to do with this case. (The Court here stated to the witness, "The question is, whether you talked to and took his statement," and the witness replied:) I talked to him, yes, sir. I did not take his statement. No statement was taken. I talked to him and made notes of what he said. He was one of the witnesses who was called and sworn at the opening of this trial. I did not talk with Dallas Ford and take his statement. I think he was one of the witnesses that was called and sworn at the beginning of this trial. I didn't take any statement from Fred Ryan; I talked to him. And C. S. Farrar the same; he was one of the first men I talked to. I talked to

(Testimony of John K. Wren.)

P. G. Raymond; I didn't take any statement. He was one of the witnesses who was called and sworn at the opening of the case. [130—88] I talked very little with A. R. Murchison; I don't think I talked to him but very little. I believe he was one of the witnesses who was called and sworn at the beginning of this trial. Some I did and some I didn't. I did not of Mr. Thornton. As to whether I made any written notations of the statements of these various witnesses, some I did and some I did not. Mr. Thornton was one of the witnesses who was called and sworn at the opening of this case. And I talked to Mr. Gabriel Miranda, and he was one of the witnesses who was called and was sworn at the opening of this case. I also talked with Mr. C. Woods, and he was one of the witnesses who was called and sworn at the opening of this case. I talked to Mr. Brown, I am pretty sure, but I did not take any written statement, and I believe he was one of the witnesess who was named and sworn here in the beginning, at the start of this case. As to whether I talked with Juan Navarez also, now, I cannot say that I did with Juan Navarez, but I did talk with Juan Alvarez. I did talk to Juan Alvarez, I believe he was one of the witnesses who were sworn at the beginning of this case. I talked with Antonio Kupas. I believe he was one of the witnesses who was sworn at the beginning of this case. I am pretty sure that he was. As to whether I talked with "Barceban," one of the witnesses in this case, I cannot recall Barceban. I don't know who that

(Testimony of John K. Wren.)

is. I don't recall a witness going by the name of Barbeson. As to whether I talked with a witness named Baltazar — Baltazar who? I talked to Maltide Baltazar. She was one of the witnesses that was sworn at the opening of this case. I believe I talked with Cresencio Armenta. I talked with Crescencio Armenta. I talked to Juana Mendoza. She was one of the witnesses who was sworn at the beginning of this case.

I say that Chito Valenzuela has not been apprehended. As to when was the last time I saw him, I cannot say that I ever saw him. As to whether I don't know that I ever saw him and all that I am then testifying, that Chico Valenzuela or Chito Valenzuela has not been apprehended is what I have heard from other parties, well, I know that from information that I received through our Bureau, it would show that he has not been apprehended. As to what I say being hearsay with me, and I don't know that Chito Valenzuela has never been arrested, of [131—89] my own knowledge, I do know of my own mind that he has not. I know that he has not been apprehended. I believe I would know him if I would see him. I have not been personally acquainted with him. I have never seen him. I would know if he was apprehended, if he had been apprehended. As to whether I know of my own knowledge, I know that he has not been apprehended. I know it from the records and from the agents who have looked for him, and know it from the people that know him. From hearsay

(Testimony of John K. Wren.)

I know that. As to whether I know that of my own knowledge, I haven't seen him—I do know, of my own knowledge that the Valenzuela that was tried down before the Commissioner Jones and bound over to this Court there in my presence was not the Chito Valenzuela that I am looking for—There is many different ways of knowing it. Just of my own knowledge, I know that he is not Chito Valenzuela—I know that Martin Valenzuela is not Chito Valenzuela. As to whether I know for instance, that John Doe is not Richard Roe, I was not talking about John Doe and Richard Roe—I was speaking of Martin Valenzuela and Chito Valenzuela. I am not acquainted with Chito Valenzuela. Of my own knowledge I know that this Martin Valenzuela is not Chito Valenzuela. I know that several ways he said he wasn't Chito Valenzuela. That is one of the ways I know, that Martin Valenzuela said he was not Chito Valenzuela. I heard him say it in Commissioner's Court. I did. I did not hear him testify here. I didn't have the power to turn him loose.

TESTIMONY OF JOHN J. FARRELL, FOR THE GOVERNMENT (RECALLED).

JOHN J. FARRELL, a witness for the Government, was recalled and testified further as follows:

Direct Examination.

I stated that I went down to the arroyo where Mr. Borgaro had said that the rifles were delivered.

(Testimony of John J. Farrell.)
The ground out there was very soft; it was soft enough to show any kind of a track—that is, in regards to footprints or a car print. [132—90]

(The Government here rested.)

TESTIMONY OF JOSE GANDARA, IN HIS OWN BEHALF.

JOSE GANDARA, one of the defendants, being duly sworn, testified in his own behalf as follows:

Direct Examination.

My name is Jose Gandara. I am thirty years old. I was born in Chihuahua, Mexico. I have lived in the United States about thirteen years. For the past eight or ten years my business has been—I have been a merchant in El Paso. I have dealt in photographic supplies and pictures and frames—art goods. I live in El Paso, with my wife and children. I have lived in El Paso about thirteen years. I had been in Tucson a number of times during April, May and June 1927. As to whether I came here to see any particular parties—none that I knew in particular. I came here to see some of the Yaquis that I knew resided here. The Yaquis that I came to see were all from Mexico, but I didn't want to talk—that is, I wanted to get in touch with the Yaquis from Mexico, and I came here for the purpose of finding from the Yaquis here how I could get in touch with the Yaquis in Mexico. When I came here there were about twelve Yaquis that had

(Testimony of Jose Gandara.)

come in from Mexico. They had come from the State of Sonora. As to whether at that time I knew the conditions in the State of Sonora with reference to whether there was peace or a rebellion or uprising there, the Yaqui rebellion has been on for years and it was particularly hot at that time. There had been a battle down there—I don't recall exactly the place, but it was somewhere south of Magdalena, in which General Armenta, and several officers and soldiers, had been killed. That was the condition at the time I came to Tucson, Arizona. I did not meet or see any of the Mexico Yaquis when I got here. I did slightly after. I came here before these Yaquis arrived. I came back on another occasion and saw these Yaquis from Mexico. From what these said, or from [133—91] what I learned, these Yaquis had been fighting and they had considerable difficulty in obtaining ammunition. They came here to Tucson to get all the supplies they could and to go back. I came here first and did not meet them, and then, the next occasion I came here, I did meet some of these Yaqui Indians. I don't recall the exact date of my second visit here, when I saw some of these Mexico Yaquis. Approximately, it was sometime during either the latter part of April or the first part of May. As to how many I saw at that time I saw various groups that were in different parts around here; altogether there must have been about a hundred and forty or fifty of them. They came from the Yaqui River. They

(Testimony of Jose Gandara.)

were armed; they were part of the band that fought General Armenta. Their object in coming out of Mexico from that battle to Tucson was to get arms and munitions, mostly ammunition. As to arms, they had them, for there had been possibly forty or fifty million rifles imported into Mexico since 1910, according to general information. I saw these Mexico Yaquis at different places; most of them at Mesquital. Mesquital is about six miles from Tucson. As to whether it is a small Indian village, I wouldn't call it a village. I think there are only four houses. Four houses on the Santa Cruz River, the edge of the river. There are four families living there, as I recall; one is Antonio Molino and another one is Francisco Feliz and I think there is another one, Juan Alvarez. I don't know if there are four or just three—I don't recall. I would say there are about four houses there, occupied by local Yaqui Indians, who live here.

As to at what other point I saw any of the Mexico Yaquis who had been coming from battle, there were—might I explain something about the way of communication that they have? They have fourteen couriers—I would see these men—I would say it is my own knowledge that I know this. They have fourteen men that they call couriers, or correos, in Spanish, and they come from the Yaqui River on foot, about three hundred and fifty miles to Tucson, where they communicate with the Yaquis who reside here; and the Yaquis who reside here al-

(Testimony of Jose Gandara.)

ways send messages and invariably munitions [134—92] and supplies to the Yaquis down in Mexico. These couriers get whatever ideas these other Yaquis have, and it takes them about six weeks to get back and tell the Yaquis down there what the message is that the Yaquis here sent to those down there; they suppose that the Yaquis down here know more about the general situation than they do down there. As to where else I saw some of the Yaquis other than in the settlement of Mesquital, I saw the couriers in the village that I don't know the name of—it is back of Sixth Avenue, about two miles from here, where I attended to wounds that two of those couriers had received in the battle of Armenta. I mean I attended to them; they were wounded; two of the couriers were wounded badly and three others were wounded, shot in the lung, one of them, and some were wounded in the leg and in the hand. I am not a doctor, but I cleansed the wounds and disinfected them and dressed them, and gave them what medicine I thought or knew would be the best for them. That was when these had arrived after that battle. I don't recall the date; it was either in the latter part of April or early part of May. These men were suffering from gunshot wounds. One of them had been shot in the lung and the canteen—his canteen was shot first, and that stopped the bullet from going through the heart. I don't know the name of that village. As to where else I saw some of these Yaquis from Mexico, there were others, I don't

(Testimony of Jose Gandara.)

recall having seen in any other place except in these two places. As to what was my object in seeing these Yaquis who had come up from the rebellion in Mexico, I wanted to go back to the Yaqui River with them, to talk to the chiefs down there, and my purpose in coming to Tucson was to get the older men of the tribe, which is their authority, to give me some sort of recommendation or document that would introduce me to the chiefs of the Yaquis in Mexico. As you know, the Yaquis do not believe or accept anybody unless they have been OK.'d or accepted by the chiefs in Mexico, by what they call the "Ocho Pueblos"—the eight tribes. The eight tribes of the Yaquis. I expected to go with these Yaquis on foot; that is the only way they travel—the three hundred and fifty miles. As to what period of time I was out [135—93] there interviewing these Yaquis from Mexico, I interviewed them and saw them about two months, something like that. These Yaquis were armed; they must have been. I know that they used Mauser rifles, seven millimeter, the regular Mexican Army arm, and they use thirty-thirties and thirty-forties, though they are very partial to the thirty-thirty. Subsequent to my interviews with these Yaquis, I obtained ammunition. That was approximately about—around the middle of June, or perhaps a little before. I brought ten thousand rounds, or about eight or ten thousand rounds from El Paso of seven millimeter ammunition. As to why I got seven millimeter ammunition—that is the arms the

(Testimony of Jose Gandara.)

Yaquis have; that is the Mexican Army gun and the Yaquis used to be soldiers in the Mexican Army, during the early administration of Calles and Obregon; as a matter of fact, it was the Yaquis who put Calles and Obregon in power. I got some eight or ten thousand rounds of seven millimeter ammunition. I gave it to the Yaquis, also with the understanding that they were to hold that ammunition, bury it and hold it until I told them— Well, I was waiting momentarily for a word from friends that I have in El Paso and in Washington, expecting the arms embargo to be lifted. As to what led me to believe that the embargo on arms, that is, the Presidential proclamation against the shipment of arms to Mexico would be lifted—I was in Mexico City in December, and I saw a telegram that had been taken out of the files of the President's office, in which he ordered a ship to sail from Salina Cruz to Nicaragua, which ship contained arms and ammunition, which was arms and ammunition which the United States Government sent to Calles to fight de la Huerta, the de la Huerta revolution, so that the Nicaraguans would fight the marines down there. That was the first intimation I had that such a thing would happen. I recall the name or mark of those rifles which I say were shipped by permission of the United States to the Calles government—they were Enfield rifles and United States Government ammunition, a large part of it—not all of it, but a large part of that shipment contained it. I saw the original telegram. I communicated this in-

(Testimony of Jose Gandara.)

formation to two officers of the United States [136—94] I communicated it, that is, I asked that this telegram be turned over to the American Embassy in Mexico City, which I afterwards found out had been done, and I afterwards told the Secretary of State about it—Secretary of State Kellogg.

I based my belief that the embargo against the shipment of arms to Mexico would be lifted on something else, with reference to some statements made by United States Government officials; there were two conditions existed there that led me to believe, and as a matter of fact, I wondered why it had not been done—one was the activities of Calles in Nicaragua—and then the enacting of laws which were confiscatory and are retroactive in Mexico, against American owners, especially oil companies, mining and land companies, and I thought that that would undoubtedly bring about either a break of relations or at least a lifting of the arms embargo. A statement was made by officials of the United States which I knew of and which caused me to believe so; President Coolidge, on or about the 10th of January issued a very strong statement to Congress, in his message, accusing and denouncing the acts of Calles in Nicaragua, and another officer, Secretary Kellogg issued very strong statement to the press along those lines. I knew of this and I knew of certain companies, owning property in Mexico, American capital, were trying very hard to get the Government in Washington to bring about a change in these laws, and I knew that it was the

(Testimony of Jose Gandara.)

opinion of even Ambassador Sheffield that there was no other way but to lift the embargo. While in Mexico City, I have heard from people that were very close to Ambassador Sheffield that he was thoroughly dissatisfied with the conditions in Mexico, and that he was not satisfied because he was not backed very strongly by the State Department. I heard expressions to the effect that if he was not properly backed in his stand that he would resign. I knew these things when I purchased this ammunition in El Paso.

I delivered this seven millimeter ammunition at Mesquital, at one of the houses; I don't know what the owner's name is, but it is the one that lies closest to the river, I would say north of the [137—95] other houses. I did not, at the time that I delivered this ammunition at Mesquital, intend to participate in its exportation by anyone before the lifting of the embargo. I held the Yaquis back here, and that is one of the reasons why I had a great deal of trouble, that I did not intend them to send that before then. I did not intend them to leave, that is, with any ammunition that I had furnished, before the embargo was lifted; I asked them specifically to remain here until we were ready. I did not explain to the Indians anything about the embargo or what I had in mind, my reason for delaying them. I just told them they should believe me, and I knew better. Their mind is rather small for that. And because of my request, the Yaquis at this village waited—remained here.

(Testimony of Jose Gandara.)

Some of them were here when I was arrested and some left on the night, on the day in the night the place was raided there. I learned that afterwards, that when the American officers came in and started to dig up the things that they found there, I heard that about twenty-seven or thirty of them, that lived on the house close to the river, had gotten scared and dug up and left. There was other ammunition that I obtained. It was about the middle or below the middle of June, on or about the middle of June, as a matter of fact, I delivered four thousand rounds or more of Mauser ammunition, thirteen thousand rounds of thirty-thirty ammunition and one thousand rounds of thirty-four ammunition. I delivered it at Mesquital. It was also buried. The Indians gave—they have—I don't understand all I know about their ceremonies and the things of that kind, but they have certain sergeants and corporals and other officers, because these men came from the Yaqui army, and they all have some sort of a position there—I don't understand the details of it. This ammunition was turned over later to these corporations and they were told to bury it and keep it there until they were told what to do. That was in June some time. As to about how long before my arrest, assuming that my arrest was along about the 25th—I imagine it would have been about, possibly, ten days or about something like that.

I did not, at any time, begin or set on foot, or provide [138—96] the means for a military ex-

(Testimony of Jose Gandara.)

pedition in the United States against Mexico. I did not at any time conspire with Borgaro or any other persons to here, in the United States, begin or set on foot or provide the means for a military expedition to go from the United States to Mexico. As to what these Indians from Mexico comprised, with relation to the military affair, from my understanding, well, they have about two thousand or three thousand fighting men. The tribe, I think, consists of about eight or ten thousand Indians, but I think about three thousand of those are fighting men, who are more or less—I don't know whether organized or not. I don't think they are organized in military form, but they have officers and they are soldiers; they call themselves a tribe. I read a document that was addressed to the older Yaquis here from the Yaquis there, about this bunch that came in. They were troops—troops who were in action in Mexico, and they came here for ammunition and were going back. I recall a trip from El Paso to Tucson, Arizona, on the railroad train, where I met Mr. Hays and John K. Wren, Agent of the Department of Justice of El Paso. I had an extremely lengthy conversation with Mr. Wren and Mr. Hays on that trip. I—Mr. Wren and Mr. Hays had been friendly to me and I had a conversation with them. I asked them to dinner. In that conversation, among other things, I mentioned to Mr. Wren my interest in the Yaqui rebellion or revolution in Mexico. I have been interested in the Yaqui cause in Mexico for two reasons, one of

(Testimony of Jose Gandara.)

them was a sentimental reason,—it was my grandfather who was the first Mexican to go up in arms and to fight the Yaqui cause, about seventy years ago. I mean he fought for the Yaquis, to free their lands which had been taken away from them by their Central Government. I think I told Mr. Wren that; I must have. I also told him that—well, I told them that I was interested in the Mexican situation ever since our home in Chihuahua was ransacked by the Obregon soldiers and my mother died as a result of the raid there. That was in Chihuahua. As to whether, in this conversation, I told Mr. Wren of my interest in the Yaqui cause and I mentioned my grandfather, I suppose I did, because that was the [139—97] main feature, that he died in one of the main battles, some seventy years ago. In that conversation, I don't recall Mr. Wren asking me or mentioning to me anything about rifles. I don't recall, on the train, that he mentioned to me anything about any rifles. I did, at a previous conversation with Mr. Wren and Mr. Colvin and Mr. Hays in El Paso. I was called to the office of the Department of Justice where I was questioned for—I think it to be about an hour and a half and maybe two hours. I was asked and they tried to find if I had any connection with some arms shipments to Nogales and other points around here. It was at that time that Mr. Wren told me that Mr. Borgaro and Chito Valenzuela had been—had gotten away from some Border Patrol officers. He said that Mr. Borgaro and Mr. Valenzuela were deliver-

(Testimony of Jose Gandara.)

ing some arms somewhere, and that they left the store in a car and the Border Patrolmen went after them in a car, but he said that Mr. Borgaro and Mr. Valenzuela got away from them and they never saw their dust. Mr. Wren told me that; he also told me that if he had been there he probably would have caught them, which I believe he would. As to how long that was before I left on this train trip from El Paso to Tucson, it will be hard to say. I imagine it must have been only a few days, possibly a week or maybe ten days, I don't know. I don't recall the time that Mr. Wren had fixed as the time when Borgaro had been arrested, with reference to dates—I don't recall the date. I was in San Diego at the time of the alleged arrest of Borgaro, with my wife and children, my family. I never had any conversation with Borgaro with reference to the purchase or furnishing of any rifles; I didn't know Mr. Borgaro until after my arrest. I had never sent anyone to him to get any rifles or to purchase any rifles. I had nothing to do with these new rifles here that have been introduced in evidence; I had never seen them until they were brought in. I did not, at the Yaqui village, on the day that I met Mr. Wren and Mr. Hays, know how many rifles, or what kind of rifles, or whether they were new or old, that had been seized by the Government. I had no information that new rifles had been obtained, purchased, found or seized anywhere; the information [140—98] I had was in regards to ammunition and other provisions and things that I had taken down there.

(Testimony of Jose Gandara.)

This information was given to me by a man named Ramon Sanchez. He was a sort of a mozo of mine, and he had seen me deliver this ammunition and some of this stuff. He was arrested on the morning of the 24th and taken to the Border Patrol office, and he heard the Yaquis say that the ammunition and stuff that I had taken there had been seized, that not all of it had been seized, but they only found a part of it, but he never mentioned a word about rifles or anything like that.

I did not state to Mr. Wren on that occasion that I had furnished the new rifles and furnished the ammunition for the new rifles and for the old rifles; I spoke generally of ammunition. I did not make any such statement as he claimed, or quantity, or what for, or anything. As to whether the Borgaro incident was brought up on the occasion when I met these officers at Mesquital, Mr. Wren told me there was some boxes there that belonged to rifles, and they were the rifles Borgardo had brought in there. As to whether he said anything with reference to who the officers were, with reference to anything Borgaro was alleged to have done, we joked a little about that. He told me, jokingly, that Mr. Farrell was one of the men from whom Mr. Borgaro and Valenzuela had gotten away, and at that time I mentioned that I heard that Mr. Borgaro was very much scared and perhaps it was the other man who saved him.

I had not met Mr. Borgaro prior to my arrest, and at that time I had never had any conversation with

(Testimony of Jose Gandara.)

reference to the purchase of any rifles, nor had I sent anybody or furnished the money for the purchase of new or of any rifles. All that I bought, I bought myself. I delivered them myself. I mean ammunition—I never delivered any arms. I never gave very much importance to the question of arms, but the Yaquis would like to get all they could, and would like new ones, but I knew rifles were expensive and they could get plenty of them; it was ammunition they were out of.

All these Yaquis that I was dealing with and that came from Mexico were armed, and I knew the inside of that battle with Armenta, [141—99] and that they were in it, and were fighting, and inasmuch as they must have been fighting with arms, for they killed a number of men, so I knew they had their arms. I heard the inside of the battle of Armenta from the men who fought there, and the wounded I treated. As to whether I got an idea of approximately how long the battle had occurred before I was dealing with them—it was about five or six days, I think—it took them about five or six days to get from where they had the battle into Tucson. I told Mr. Wren that I was walking through the hills, preparing for my trip to Mexico. I was. I was doing that; it was to be a very severe hike and I wanted to prepare myself as best I could. I had been walking through the hills around here for, I suppose, a month or six weeks, with about sixty pounds—a knapsack. That was not altogether about six weeks—I mean, not continually, but for a period

(Testimony of Jose Gandara.)

of six weeks, I walked a great deal. As to whether I spent all of my time here in Tucson or that time—I said that for a period of six weeks before my arrest this continued—or had I gone east or west of here, I had been away several times. I didn't want to remain here long, because I was continually accosted by the Indians, by the Yaquis, who were anxious to get away. They were very anxious to go back. They sent two or three expeditions from the Yaqui River, to find out what had become of these hundred and fifty men, approximately, that left there on that expedition. As to whether I fixed a date or two upon which I expected to start—at times, when I was forced to say something to them, I said, "Well, it is all right; we will leave on such-and-such a date," more or less. I put them off two or three times.

As to why I was postponing my departure for Mexico with this ammunition, I was expecting momentarily a lifting of the Arms Embargo. I was communicating with friends in El Paso and expecting word from friends in New York, who were in touch with the situation, and expected at that time that the embargo would be lifted.

I don't remember having told Mr. Wren or Mr. Hays, on the occasion of our meeting in the Indian village, that I had expected [142—100] to leave the next night. I don't recall making that statement, and as to if I made it, in what vein was it made, I did do a good deal of joking with them, and said, "You spoiled a nice party. We probably

(Testimony of Jose Gandara.)

would have gotten away to-morrow night if you hadn't spoiled this party." But I didn't make any statement as to that and they weren't expecting me to make any. I did not expect to leave the next night, or the next night after—possibly within the next week, if the embargo had been lifted. I always needed four or five days preparation, after I knew we could leave, to get my things together.

As to whether these Indians I was dealing with, came to the United States, from what they told me, with the intention of abandoning the Yaqui cause and to cease from fighting, or for some other purpose—they were troopers—I mean, members of the Army, and they take that very seriously. It would be a disgrace for a Yaqui who belongs to the army to go away and not come back. There are some Yaquis residing here who are not army men. They may go down and fight once in a while, but they don't belong to the regular fighting group, but those that belong to the regular fighting group are not expected to remain away; they are expected to go and attend to their mission and then they are to return and fight. Captain Sebastian, who was one of the chiefs of the Yaqui tribe, of which Antonio Kupas, one of your witnesses, he is a lieutenant, came up to find out what had happened to them. They arrived here about the time I was arrested. I think Mr. Wren took them from Mr. Molino's house, together with a few other Indians who still had their guaraches on here. I remember distinctly he was one of the men Mr. Wren arrested.

(Testimony of Jose Gandara.)

When I was examined in El Paso, with reference to the shipment of rifles or some sort of ammunition to Nogales, I told Mr. Wren that I had inquired in various places as to the stock of ammunition and prices, and that I had asked these people in Nogales, that he referred to, as I did others, what the prices were and what quantity they had. I was always interested in knowing about the stock of arms and ammunition. I was interested because after the Arms Embargo became lifted, they would be hard to [143—101] get, and if I needed them I would need them rather quickly. You see, the embargo applies in Mexico, not only to the opposition of the Calles government or so-called government, but it also applies to Calles himself. It is a sort of a double-edged sword which the United States Government uses on Calles, to try to get him to change those laws that are retroactive and against the rights of property owners, and of course if the Arms Embargo was lifted, the Mexican government would buy all there was to be had, naturally. I was endeavoring to ascertain what stock there was to be had of arms and ammunition. I wanted to know what stock they had of shells and the price. I didn't make any deals, but asked for information. I did expect to espouse the cause of the Yaquis and go down to their fighting country, I intended to go down and talk to the chiefs, and after they had accepted me I—after they had accepted me as one of their leaders, or one of their men, I would have tried to provide some military man with military

(Testimony of Jose Gandara.)

experience—I haven't any myself—which would have directed their operations. They were fighting continually but, to my estimation, in a very ineffective way, with small bands and no co-ordination and no particular point in view.

I am against the so-called Calles government. I told Mr. Wren that. I told the Secretary of State, Mr. Kellogg, that. I told him I was going to engage in revolutionary activities, tending to the overthrow of the so-called Calles government, that I would do what was in my power to create or establish a government that would be honest, that would protect the lives and interests of the American people, that would protect their rights of property of foreigners, and that would live up to its international obligations. As to whether I stated that to Mr. Wren in my conversation, I took these things to be sort of secret, which should not be divulged like that. When I stated that I had told the Secretary of State frankly that I expected to engage in revolutionary activities, I did not, at that time, expect to violate any of the laws of the United States, and I so told them.

As to whether I furnished any provisions to these Mexico [144—102] Yaquis, well, I practically supported possibly sixty—say, fifty or maybe more, for about two months. It was the only way that I could keep them around. They were very anxious to get back. They expected—you see, a man named Juan Frias was very active on the organization of that group I mentioned, and that group that came

(Testimony of Jose Gandara.)

out here to get these arms, he told them he had lots of things here for them, and when they came and found that they had not, and found some had been arrested near Nogales by the Border Patrol, they were rather suspicious and very desirous of the first opportunity to get back.

I bought clothing for them. As to about how many, I suppose that I must have bought, altogether, about for a hundred. I bought the clothing at various stores in town—in Tucson. This clothing and supplies, these clothing supplies that I purchased were for the Yaquis that came across. They were practically bare you know. The country between here and the Yaqui River is very rough and they came through a lot of mesquite and things, and they were all scratched up and practically naked when they came in; also the Yaquis here made a collection among them to help these men. They drew money from various villages around Arizona, as they always do, when a bunch comes in, to help them out. As to when I say "bunch" what do I mean—a bunch of Yaquis that came up here intending to go back—I haven't heard of anyone else. As I know, a troop comes up here and get supplies and ammunition and goes back.

I hardly expected to lead these Yaquis when they left here. I don't know the country and they would not obey me, wouldn't pay any attention to me. I had never been over that trail they were going to take and knew nothing about it but from hearsay, I knew it was very rough, and I knew they

(Testimony of Jose Gandara.)

had no horses and would have to depend entirely on their knowledge of the country as to where we could get water and where to kill the game and cattle or whatever we had to feed upon. So my answer is that I did not expect to lead them. I had to go as one of them and use the same means of transportation as they used.

I did not have any connection with the arms or rifles [145—103] that are alleged to have been found in the possession of the defendant, Borgaro. I had no connection with any rifles whatsoever that were delivered to the Yaquis—I mean, I had nothing to do with it.

I had no connection with the alleged shipment of twenty-three thousand rounds of ammunition from Momsen, Dunnegan & Ryan Company, of El Paso, Texas, to Borgaro at Tucson. I heard about such a shipment, after the shipment had been found, I was told that Momsen, Dunnegan & Ryan had been forbidden by the Customs from exporting anything into Mexico as a result of that shipment. But I just heard of it after the thing came out. Prior to that time, I had not heard of it, or had any connection with it or brought it about, or had anything to do, directly or indirectly, with bringing that about. I did furnish canteens to the Indians and I furnished canvas. I did not, at the time I furnished any of these things, have an intent to violate any of the laws of the United States. I did not intend to violate any of the laws and I don't believe I was. I had never seen any of the Indians' rifles

(Testimony of Jose Gandara.)

while I was out there. They were rather secretive as to these things; they never showed anything of those that they had. Some of them buried them before they got into the village, out in the mountains somewhere, and others brought them right into the villages and dug up holes and buried them there.

I did not, in my acts and connection with these Yaqui Indians, make any effort to recruit anybody to join with them that had not come with them; they would not allow that, anyhow. That was their way of doing. I knew that all the time, and I never had any intention of recruiting a man. It would not do me any good to recruit men to take down, to fight a big army with a handful of men, and that is a violation of the law—you cannot recruit men and not violate the law. I knew that, because I knew that Estrada had been convicted because he started a military expedition and recruited men and started out.

Cross-examination.

As to whether I stated that I saw a telegram in the President's office or not in the President's office—that was taken out [146—104] of the President's office; President Calles. Friends of mine had that telegram. I don't recall their names. As to how many friends I had that had possession of that telegram, I suppose five or six, perhaps. Out of this five or six friends of mine, men whom I would designate as friends, I cannot remember a single name—I do not recall the names. As to

(Testimony of Jose Gandara.)

whether I cannot remember a single name out of the five or six men whom I stated were my friends, who would go into the President's file and take out a telegram for me—they did not take it out for me. I saw that telegram that had been taken out of the file and it was shown to me. I did not take it out myself or have it taken out. (The witness here stated to the Court: "Your Honor, I would prefer, if agreeable to Mr. Perrin, that the name or two of those that I have recalled not be mentioned, because it would mean the death of those two." To which the Court replied: "You were asked on direct examination with reference to that telegram and the Government, in the cross-examination, has a right to test your credibility in that regard, and it is your duty to answer the question." Whereupon the witness continued.) The name of one of those men was Julian Martinez. I don't remember the others. As to whether I didn't state a moment ago that I remembered the names of two of the men, No, I—No, I said I might remember some of them; I just remember some of them. There is another man, whose full name I do not recall—his last name was Aguirre. I saw the telegram about the 9th day of December—December, 1926. I did not to talk to Mr. Kellogg. I did not state on direct examination that I talked to Mr. Kellogg; I said that I told Mr. Kellogg. I did not talk to him; I sent him a registered letter with all the information. I did not say that then Mr. Kellogg replied to me that the embargo on arms would be lifted. Mr. Kellogg

(Testimony of Jose Gandara.)

did not say anything about the embargo on arms and ammunition being lifted. As to what other government official I talked with about the arms embargo being lifted on arms and ammunition—what American official—none told me that it would be lifted. No American official told me that the embargo on arms and ammunition to Mexico would be lifted, making a statement of that kind. But from conversations I had, and [147—105] knowing the conditions and the statements that had been made by the President of the United States and by Secretary Kellogg in regard to the Nicaragua interference of the Calles government, I understood by those statements and the conversations I had with others, that it would be lifted. I know that the American Government is the one that placed that embargo upon arms and ammunition. And I know that the American Government is the only one that could lift that embargo. I knew, at the time, that if the embargo was to be lifted, the American Government was the only one that could lift it.

As to whether I talked to a single American official about it—I had had conversations with people that were close to official circles, and it was the understanding at that time, general understanding that it would be lifted. I stated that the Arms Embargo was applied to both the Calles government and the opposition to the Calles government, as a sort of a means of holding them down to certain promises that they had to live up to. It is not in reason for governments that are at peace

(Testimony of Jose Gandara.)

and still have embargoes on other governments with which they are in peace.

I stated that I had lived in the United States for a period of thirteen years. I do not speak English very well. And I was living in the United States at that time—at the time I purchased these arms and ammunition—not any arms—ammunition, not arms. I didn't purchase any arms—when I purchased ammunition. As to whether I was in a position that I could have made inquiry about the embargo, I was in a position to know immediately that the embargo was lifted. Friends that I have were to furnish me that information. The friends were—one of them was an attorney in El Paso, who—his name is A. W. Norcott. As to who were the other friends in El Paso, that is the only one that I could expect any communication from in that respect, and he was connected with friends in New York, who would tell him, and I expected, through his channel, to know about that. And I never made inquiry of any American official, any United States Attorney's office, anyone who would know about the embargo; I knew they would not disclose it if they intended to do that. I knew it was a violation of law to export arms to Mexico before the embargo [148—106] was lifted. Before the embargo was lifted because the embargo, if I may say, the embargo was not a regular law; it is a measure or decree that was used by the President for a special reason and it could be lifted by the President for special reasons, too; that is my understanding. I

(Testimony of Jose Gandara.)

also knew it was a violation of the law to recruit men in the United States—I knew that. In other words, I was not very familiar with the neutrality law, only certain things I knew about cases that had happened, that should not be done without violating a law. At least, my understanding was that you could purchase arms or ammunition, either one, in the United States at any time you chose. And as to whether I could have purchased it in the United States had the embargo been lifted, the same as I could before the time it was lifted—as far as purchasing is concerned, I could have—that is my understanding. As to why it was necessary to purchase ammunition and buy it out at Mesquital, in the hopes that some time in the future the embargo might be lifted, if I could purchase ammunition in the United States before it was lifted, the object of delivering that ammunition was this—the Yaquis were very suspicious of me, they were, not all of them but some of them. There were three or four factions in here, that was the de la Huerta faction, and there was a man by the name of Medina, Ogarte Medina, who was a general in one of the revolutions in Mexico. He was passing at one time, was posing as a friend of mine. He had intentions of getting the Yaquis to go with him, or follow him, or for him to go with the Yaquis, and there were two or three other parties that were interested also in getting the Yaquis, and they told, this man Medina especially told the Yaquis that I wasn't going to give them anything, that I was just fooling

(Testimony of Jose Gandara.)

them and that I didn't intend to give them anything. And at that time, to convince them of my veracity, I gave them that ammunition. I said I had not had anything to do with the purchase of twenty-three cases of ammunition found in Mr. Borgaro's store. I don't recall at any time of having tried to make a purchase of about thirty-five thousand rounds of ammunition from anyone, outside of the ammunition that I have admitted that I purchased in El Paso and furnished to these Yaqui Indians. I remember that I purchased other ammunition here in town and delivered to them. [149—107]

As to whether it is not a fact that I was in Momsen-Dunnegan & Ryan in El Paso and tried to purchase from them thirty-five thousand rounds of ammunition, about the time that this ammunition, or shortly before the time that this ammunition was shipped to Mr. Borgaro, I don't remember having made any contract for the purchase of any ammunition other than that which I bought. As to whether or not is not a fact that I went into Momsen-Dunnegan in El Paso and asked about the price of rifles—I asked about the price of generally arms and ammunition at different places. I did not ask specifically about the price of rifles, but generally about the price of arms and ammunition. As to whether I asked Baraca Brothers the price of thirty-thirty Winchester repeating rifles, I asked the price of rifles, and also the price of thirty-thirty rifles. I did not also ask at that time of Baraca

(Testimony of Jose Gandara.)

Brothers in Nogales, Arizona, if they could make delivery of rifles about fifteen miles out of Nogales, Arizona. I asked them if they could deliver munitions that they were asked price on. I don't remember mentioning any particular place; I don't remember having done that.

Redirect Examination.

I was asked with reference to having talked to any Government officers with reference to the raising of the embargo, and I said that I had not. Outside of the statements of President Coolidge and Secretary of State Kellogg, I read press reports of the apparent or probable intention of the Government with reference to the embargo; it was my impression at that time that it was practically a certainty that the embargo would be lifted. I also heard some man,—I don't recall his name now; it was Morton or something like that,—who is very close and I think connected with the American Embassy in Mexico City, who said that he was practically certain that these things which had happened, which caused the statement of the President Coolidge and Secretary Kellogg, indicating that situation would bring about that change. I knew that that embargo had been placed as a sort of a bond or restraining—if I may call it like that—a restrainer on the Calles government, and when he violated the laws of friendship [150—108] as in that he sent arms and ammunition to enemies of the United States, there was nothing else to be

(Testimony of Jose Gandara.)

concluded except that it would be lifted. With reference to what counsel has examined me with reference to whether it was a fact that I could buy ammunition after the embargo was lifted, just the same as it could be bought before it was lifted, and as to whether it was a fact that the probabilities were that I could obtain ammunition after the embargo was lifted, or whether the contrary was true, that I probably could not purchase ammunition after the embargo was lifted, it would have been very hard after the embargo was lifted, because, as I said before, the Calles government would be the first one to place orders for everything available.

TESTIMONY OF ESTEBAN BORGARO, FOR DEFENDANTS.

ESTEBAN BORGARO, one of the defendants, being duly sworn, testified in his own behalf as follows:

Direct Examination.

My name is Esteban Borgaro. I am living at the present time, at 28 East 15th Street, in Tucson. I was born in Mexico, in the Italian Consular office. I am thirty-eight—going to be thirty-eight; I was born the 13th of November. I have lived in the United States approximately, I think, about nine or ten years. During that time I lived in Los Angeles with my uncle, Secundo Guasto, who was the president of the Italian Company. I have also lived in Bisbee; I worked for the Copper Queen

(Testimony of Esteban Borgaro.)

and I worked for the C. & A. I have lived in Tucson about seven years. As to what is my business and occupation since I have been in Tucson, I have general merchandise. I have guns, ammunition, supplies, Mexican and Indian curios, bicycles—so many things, it is hard for me to mention all the lines I have. My store is located at 41 Meyer Streeet, Broadway and Meyer. I do not know Mr. Gandara here. The first time I met him is right here in this courthouse. As to whether I purchased these guns with reference to which there has been testimony, and also some other new guns that are on the floor, on the other side of the boxes, well, I know the new ones they took out of my store. I do not know the old ones; I don't know anything about it. I bought these guns from San Francisco. I [151—109] remember when I ordered them. About the 6th I was to see Mr. Conger, who is an old salesman, that has worked a good many years, and sold us so many other things before. The guns got here about the 9th of June, 1927. I went to the American Railway Express office, as has been testified to here, and made inquiries with reference to the shipment. The shipment belonged to me. They sent it down to my place. They sent it to my place on the ninth, in the morning, about ten o'clock —the ninth of June, this year, 1927, about—around ten o'clock. As to what I did with any of these guns. Before I took, well, before I ordered these guns, a man went into the store, and several others, trying to buy guns from me, and I says: "Well, I

(Testimony of Esteban Borgaro.)

haven't got these in stock right now, but I can get them for you, the other things I haven't got, but I don't know any of you fellows and I want to have a deposit to order the guns for you," so they deposited four hundred dollars, so I gave a receipt for it and I ordered the guns. Then I went to see Mr. Conger that same day, and he lives out on Speedway and I—we went for a ride, my wife and myself and two girls, the two nieces of my wife. We went for just a ride, and my wife say, "Let's visit Mr. Conger," for Mr. Conger was living on Speedway, so we went to Mr. Conger's house, and I asked him if he would be able to get some guns for us, and he said, "I think I can; I can wire to the house and find out." "Well," I says, "I am losing so many sales, I wish to have these as soon as possible." That was about the 6th. As to whether the guns came, in pursuance of that order, about the 9th, before that, I want to tell. Mr. Conger wanted to find out about the money, to be sure, because four hundred dollars wasn't enough to cover that amount, and I haven't much money at the bank then, because I just paid a note of mine on the house we bought on South Stone Avenue, and I went to borrow a thousand dollars from the bank, and then Mr. Conger was with me, and he sent the order. That was the 6th. And the 9th the guns were delivered down to my place there. As to what I did, if anything, with any of these guns that same day, well, that same day they came, several men, and they want to find out about the

(Testimony of Esteban Borgaro.)

guns, or "Have you [152—110] guns?" I say, "Yes; I got them right here," and "Well," they said, "I want two," and another said, "We want two," so I sold approximately twenty-four—no, twenty-five, that is one, another man, the man that was going to take care of the guns, bought one, and then my wife, she already have sold four of them.

As to what I did with any of the guns that I received in the morning, that man ask for accommodation to deliver, "Well," he said, "In any place where you buy plenty of merchandise, they always deliver it." "But," I said, "we have no truck." He said, "You have a car. Can you do that for me?" "Well," I says, "Before I do any delivering I want to be sure of the money," and so he paid me the balance and then I went and take the back seat out of the car, so I could make better room, and I loaded twenty-five guns in my car and I put a canvas over them, so none of them peep over, you know, fall from the car, and I went with that man. I did not know who this man was; I really didn't know. I think his name is Valenzuela. I have since learned his name; the first time I heard of him. As to where I went with this man, Valenzuela, he told me he was going to deliver at a house at a place called Millville. I never was there in my life before, and I went with him in my car. I understand I was to deliver this to a house, on that understanding, and we went west on Congress—what do you call? West on Broadway and then turn to the left on Main Street, and then we turn

(Testimony of Esteban Borgaro.)

to the left, about two blocks from there, and then to the right, and I said, "Well, you have to tell me; I don't know which way. You tell me Millville, and I don't know which way." He said, "Millville is on the left side of town," and I was sitting driving and he was leading me, you see, and we went on to deliver at the house, and I said to him, "Where is the house?" and at the same time the train was passing by, and we couldn't go straight and have to go around away past,—that part of the track, you know, is very hard to get across, because they have no bridge or nothing, or passway, or whatever you call it.

As to what the man said with reference to delivery at the house when we got there, well, he says, "The house is a little further," [153—111] and I don't find any house and I says, "Well, where is the house? You are going too far. You told me was a house near Millville. Here is Millville, and no house here. "Oh," he says, "the house is a little further, a little further," and then he forced me to go and I went to the place, almost to the wash, you know, they call—Mr. Wren says arroyo—and it is hard caliche there, it is almost like the formation of rock, and I saw on the side, I saw a truck there, a Ford truck, with several men, ten or twelve men, waiting there for the guns. Well, I don't even move out of my car. I just keep my sitting and they unload the guns from one car to another; they pass by one man to another and get it unloaded and then they take the canvas that I had over them.

(Testimony of Esteban Borgaro.)

I said not to take it and he said, "Well, we bought plenty from you; can't we have that piece of canvas?" I said, "Well, take it." What can I say? Then I went back to town and went to the store.

Going back to this trip, I did not look back out of my car at any time, at the time I left the store and went along Main Street, and south and east, as I have testified; I never did. I didn't have to. I have a glass in my car and can see several blocks back without looking back. I suppose we were going a little better than twenty but not over thirty. As to the character of the streets down there, they are very narrow in just this part of town; it is what they called the "Old Pueblo" and in some places there is not room for two cars to go back and forth. The roads were rough; and this man forced me to go ahead when I saw there was no house there. He said to me, "Well," he says, "if you don't keep on going, I am going to make it hot for you, and you will be in trouble." I said, "What do you mean by that?" He says, "I got so many things I could do with you, if you don't go," so I have to do whatever he want me to do, because it seems to me like he have something in his hand, I don't even look to his face, just keep on riding,—driving, I mean. At the time I sold these guns, or ordered them, or delivered them, I had no intention to violate the laws of the United States. After Mr. Wren was at the store, I had made some inquiries of somebody as [154—112] to whether it was lawful to sell arms and ammunition in the United States;

(Testimony of Esteban Borgaro.)

I asked Mr. Ford if it was an embargo, local embargo, to sell any guns, because I don't know what embargo was. You see, it was a strange word for me. I never studied in English, only in Italian and Spanish, and you know I know to speak the English only what I learned in the store; I couldn't speak a word of English when I came here. I thought embargo meant local sales you would make. As to what Mr. Ford told me it meant, he said, "You can sell all the guns you want as long as you get the money; you don't care what they are going to do with it." I really did not know, at any time, from the time of taking the order until I made the delivery, that these guns were not to be used for a lawful purpose. I never ask and I have been selling guns since Mr. Davant was in business there, since which I bought him out, and my wife had a half share in that business, and they were selling guns ever since, for years and years selling guns and ammunition. I do sell many guns. I also sell much ammunition; lots of times I buy right here from the Sporting Goods and Steinfelds, which are the only wholesalers in ammunition and guns, I buy forty and fifty and sixty dollars every day.

As to the testimony with reference to the twenty-three thousand rounds or twenty-three cases of ammunition, of cartridges, I ordered these from Momsen-Dunnegan-Ryan Company at El Paso, Texas. Somebody had spoken to me before that time with reference to purchasing this ammunition. I bought it because they give me a long date, what you call

(Testimony of Esteban Borgaro.)

future order, to get them. He was—the salesman from Remington Arms Company was at the store and he says, "Mr. Borgaro, why not buy plenty, so as not to be buying all the time in town? You can save money. I could give you to pay January first, and give you a two per cent discount, so you don't have to pay until January. You buy more than that here in a very short time and you can save money by buying quantities like that." And I don't think they will do anything, and I said, "Maybe, it is too many; I am afraid to have too much money tied up," and he said, "Well, you will sell these before December, and have your money back, and save buying every day here and paying," and so I had been [155—113] buying forty to sixty dollars every day here in town, and so I thought I could pay for it later and turn that money into something else, and that is the reason I bought this ammunition. I had no agreement or contract with any person to resell it or to sell it again. That came by freight.

I think it was about quarter after one P. M. when I started to make delivery of these guns—when I left the store. I got back until nearly three o'clock. I think I ate dinner in the meantime at home. When I got back I met Mr. Wren. That is the first time I met him, at the store.

(Court here adjourned for the noon recess, and upon return the witness resumed his testimony on direct examination.)

I testified here before lunch that I got back to

(Testimony of Esteban Borgaro.)

the store on June 9th, 1927, and met Mr. Wren there. He was with several Border patrolmen. I really don't remember how many were there. I know Mr. Caldwell very well. He was there and Mr. Farrell was there. Giving my version of the conversation I had with Mr. Wren that afternoon when he first came in he says, "Where are the guns?" I said, "Well, part of those are in the store," "And where is the other part?" he said, I said, "I delivered those." He said, "Well, can you show me just the place where you delivered them?" I said, "Yes, sir, with very much pleasure I will show you the place." "Well," he said, "get in my car"—and I think it was a Chevrolet car, a touring car, and I went with Mr. Wren, Mr. Farrell and Caldwell, Mr. Caldwell. As to what I told them with reference to any delivery that was to be made to a house, "I thought I was going to deliver these to a house, but I will show you the place." I didn't say anything about that to Mr. Wren until he asked me. He said, "Do you know the place where they were delivered?" I said, "Yes, I can show you the place." I just went in the car with them, and I showed them the way we turned and which way we went, and with the same turns, very nearly the way we did, the way I did with this man that I delivered the guns for, and I took him to the place where the delivery was made by me to these ten or twelve men. As to whether I had any further [156—114] conversation with him there, well, he talked a few things, in a way, you know, but I really

(Testimony of Esteban Borgaro.)

don't remember exactly what he was talking to me. As to whether anything was stated with reference to my knowledge of the fact that these guns were for revolutionary purposes, he says to me, "Didn't you realize that these guns were being sent into Mexico?" I said, "No, sir, I don't realize until just now. I realize now that they were for that purpose, maybe, but I am not sure about it," I says. He talked quite a bit to me about that, you know, and I said, "Mr. Wren, I am really telling you the truth; if you don't want to believe me, it is up to you, but I am not a liar." He insisted very bad to talk to me about these guns, and that I knew—Well, he ask me in a way, wanted to know whether I knew folks. "Do you know Mr. Gandara?" I said, "No, sir, I do not." "Well, do you know—" some other names that I really don't remember. I said, "No, sir, I do not." And then he said, "Well, you know very well that these guns were bought to be sent into Mexico." "No, sir, I do not," and he insisted very much, and he said to Mr. Caldwell, "Well, what do you think about this fellow? Do you think he is telling me the truth?" and Mr. Caldwell he says, "No, I don't think so," and that is the way he answered, and in the meantime Mr. Farrell went and see another wash, the next to that one, and he look around and he says, he try to dig with his foot in several places, and he come and says, "Mr. Borgaro, I don't think that was the place where you deliver the guns. I think that other place was the one you deliver the guns."

(Testimony of Esteban Borgaro.)

I said, "I really don't remember; I am not acquainted with the place; it may be here and may be over there. I don't know exactly the place." And that was the place, or about the place, where the actual delivery was made, just as close as I can tell. Well, according to the way I noticed, it was right behind the Southern Pacific shops, you know, the machine-shops and the boiler-shops; I was about, maybe three hundred feet or around four hundred feet. I did not know at the time that these guns were ordered; or at the time that I started out with them to make delivery, that they were for revolutionary purposes [157—115] or to be taken into Mexico. As to whether or not this sale was made by me in good faith, in the course of my business as a merchant—just the same as any other business to me, you know. Somebody else came down there and tried to get me to say that I knew at the time I took the order for the guns that they were to go to Mexico and were for revolutionary purposes; these two gentlemen (indicating), Mr. Wren and the United States Attorney. Mr. Perrin went down there to the store. He didn't ask me any questions, you know; Mr. Wren was the one asking me all the questions. Mr. Perrin only asked me how many were there at the store, and if I knew these were for revolutionary purposes, and I said "No," and a lot of other things that I don't remember, but just about the same matter, you know, about the rifles. I became suspicious that they were to be used for a wrongful

(Testimony of Esteban Borgaro.)

purpose, an illegal purpose when we crossed the track and that man could not find the house, and I could see he was trying to fool me and he did, because I was—I really understood I was going to deliver these to the house. And I became suspicious then that this delivery was made out in the desert. I did not, at any time during the course of this transaction that I had with this man whose name I do not know, conspire with Jose Gandara, Bishop Navarette, Chito Valenzuela or with any other person to violate the laws of the United States. I was never interested in Mexican politics when I lived in Mexico. As to whether I left Mexico for any political reasons or for personal reasons, I left the country on account of the peace, I want to be in a peaceable country, like the United States is. But I have never taken any part in Mexican politics, either while I lived there or since coming here; never in my life.

Cross-examination.

I stated that when this ammunition was ordered that the company from which I ordered it would not require me to pay for it until the following January, and that I was to get a discount on it. I was to receive, on January first, two per cent discount. That is the way I understood, and I was to be allowed that two per cent in [158—116] allowing the bill to run—that is, if the bill were to be paid by the first of next January. As to whether I am familiar with the trade discounts that are allowed

(Testimony of Esteban Borgaro.)

by various firms, the various mercantile firms, this was a special offer by the salesman of the Remington people, direct from the factory; it is not from Momsen-Dunnegan. That is the way I understood it—that anyway I was to be allowed two per cent discount when I ordered this ammunition in June, I was to be allowed a two per cent discount if I paid for that the next January. (Counsel here submitted invoice of Momsen-Dunnegan-Ryan to witness and asked him to look at the figures on it, which the witness did and said:) Two per cent, ten days—well, I made a mistake. I have stated that I have lived in the United States for a period of ten years, just about. As to whether I spoke English about as well during June of this year as I do now, I been learning a few words, some since I have been in court here—I learned a few words that I did not know before, because I never was arrested in my life. But I spoke English just about as well as I do now, and I understood pretty thoroughly some of the things that were told me—not everything. As to whether I understood pretty well what the men who talked to me about ordering the rifles said, well, they wanted some rifles. They did not speak in English; they spoke in Spanish. I understand Spanish pretty well. I understood pretty well when Mr. Wren was down talking to me, some things—he used high words and I really did not understand some of the conversation. I did understand what he said when he asked me where the rifles were. I never did tell him they were all

(Testimony of Esteban Borgaro.)

in the cases at that time. And after that he didn't tell me that the Border Patrolmen saw me take them out; he did say something to me about that, but I never did say anything. As to what the occassion was of his telling me that if I did not tell him they were all there—I tell him, "Part of these are inside of the store and the other part, I deliver them," and he want to know if I knew the place where I delivered them, and I said, "Yes." No, I didn't tell him first that I delivered them to a house, and then after that I told him that I went down South Main Street and then took them out to Millville and showed them the [159—117] place where the delivery was made to a truck, to the men there with a truck. Describing those men that were on the truck—they all speak pretty good Spanish, I thought they were Mexicans. I am mighty sure—they spoke just as good Spanish as I can. I know a Yaqui Indian from a Mexican; I don't think they were Yaquis; all Mexicans every one of them. As a matter of fact, I did not take those rifles down to Mesquital and deliver them down at Mesquital at the house of Antonio Molino, with Chito Valenzuela. I did not do that. As to whether when Mr. Wren came down to my place he used strong language on me, well, he didn't treat me very well, you know, really, because I never was treated like that in my life. He kind of imposed on me, and I know he was an authority and I have to respect him and I told him everything I know about it. He said to me, "You see, you are in a hell of a shape; you

(Testimony of Esteban Borgaro.)

see, you are up against it. If you don't tell me the truth about it, you will be in an awful mix," and I was—I told him, "What do you mean by that"? He said, "Well, I represent the Department of Justice, and I want you to tell me exactly the truth, what you know, and where you delivered the guns," and I said, "Yes, I will do that," and he said, "Well, are you willing to go with me?" and I said, "Yes," and I went with Mr. Wren and Mr. Caldwell and Mr. Farrell. And I went out to this arroyo. I went to the arroyo, I went to the place that I delivered the guns. As to telling the jury how I took those guns off of my car and delivered them to the truck, I didn't take them off the car. The men that were in the truck, waiting for us, delivered them to the truck. The truck pulled up alongside of the car. It pulled right along beside the car, and that was out near Millville, southeast of town. All that country out there is not sandy, more or less, that place where we were is kind of a caliche formation there, very hard rock. Not rock; it is all caliche, that is what I understand. It is not rock, but is not a sand place, either. The ground is so hard that a truck would not have left a track, and the reason they couldn't see any truck tracks out there is because it happened to be hard ground and the truck would not leave any tracks. I don't know if Chito is the man who went down with me with the rifles. He was a heavy-set man, about my size, wearing a mustache, I think. He was a Mexican, I think. [160—118]

The defendant, at the time the Government rested, and before putting any witnesses on the stand in his behalf, moved the Court to instruct the jury to return a verdict of not guilty, which motion was renewed at the close of the case, and which motion was as follows:

That the defendant move the Court to instruct the jury to find the defendant not guilty, for the following reasons:

Because no credible evidence has been introduced to connect the defendant with the conspiracy charged in the indictment.

Because no evidence has been introduced that would warrant the Court in permitting a verdict of guilty to stand.

Because the undisputed evidence shows conclusively that if any military expedition was ever begun, set on foot or provided or prepared for, within the sense of the statute, it was begun, set on foot, provided and prepared for in Mexico and was being carried on and to be carried on from Mexico and not from the United States.

Which motion was denied when first presented, and likewise denied when presented at the close of the case, to each of which rulings of the Court the defendant thereupon excepted. [161—119]

INSTRUCTION REQUESTED BY DEFENDANT.

BE IT REMEMBERED, that during the trial of this cause and at the proper time and before the

jury retired to consider their verdict, the defendant in writing requested the Court to give the jury the following instruction:

"The jury are instructed, if prior to the commission of any of the acts charged in the indictment, a revolution or revolt of the Yaqui Indians was in existence in the Republic of Mexico in which armed forces of the said Indians were in conflict with the military forces of the Mexican government, and if members of such armed forces of the Yaqui Indians came to the United States for the purpose of securing munitions of war and provisions, and then returning to rejoin the forces of such Indians in Mexico, and the defendant Gardara furnished ammunition or provisions only for such Indians as had come from Mexico, and intended to return to Mexico, and not to recruit or secure other Indians to go to Mexico, then such furnishing of ammunition and provisions would not constitute either a military enterprise or a military expedition as those terms are used in the statute of the United States on which this prosecution is based, and the defendant Gardara would not be guilty of beginning, setting on foot, or furnishing means for any military expedition or military enterprise, and a conspiracy merely to furnish ammunition and provisions to Yaqui Indians who had come from Mexico and were intending to return to Mexico under the circumstances above mentioned, would not be an offense against the United States."

Which instruction the Court refused to give, to

which ruling of the Court the defendant thereupon excepted. [162—120]

Whereupon the Government rested and the defendant rested, and counsel for the Government and counsel for the defendant presented their arguments to the jury.

BE IT REMEMBERED, that during the trial of this cause further proceedings were had; the Court charged the jury as follows:

INSTRUCTIONS OF COURT TO JURY.

Gentlemen of the Jury, it is not my purpose to sum up the evidence in this case; counsel have already done that. To do so might not serve any useful purpose and, besides, it would not relieve you of the responsibility of finding the facts for yourselves.

The indictment in this case charges the defendants, Jose Gandara and Esteban Borgaro, who are now on trial, with certain other persons therein mentioned, with the commission of an offense in violation of Section 37 of the Penal Code of the United States. That Section is as follows: "If two or more persons conspire either to commit any offense against the United States or to defraud the United States in any manner, or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than ten thousand dollars or imprisoned not more than two years, or both."

Thus you will observe that the specific offense

with which these defendants stand charged is that of a conspiracy, and if they are convicted, or either of them is convicted, he or they will be subject to punishment under the law I have just read. The matter of the punishment, of course, is a matter for the court,—an unpleasant duty, frequently, Gentlemen, but it devolves upon the Court.

The court is made by the law the Judge of the law and the jurors are made the Judges of the facts. It is your duty to pass upon the facts, and the issue for you to determine in this case is the guilt or innocence of these two defendants now on trial. [163—121]

The indictment alleges that the object of the conspiracy, or, rather, the indictment alleges that the defendants "did knowingly, willfully, unlawfully, feloniously and corruptly conspire, combine, confederate and agree together and with divers other persons whose names are to the Grand Jurors unknown, to commit an offense against the United States of America, to wit, the offense of knowingly, willfully, unlawfully and feloniously beginning, setting on foot and providing and preparing the means for a certain military enterprise to be carried on from the State of Arizona, within the United States of America, against the territory of a certain foreign country, to wit, the Republic of Mexico, with whom the United States, throughout said period of time, were at peace, which said offense is defined by Section 13 of the Federal Penal Code, that is to say, at the time and place aforesaid, the said defendants did conspire to set on foot and provide and

prepare the means for an enterprise, having for its object the inciting of armed rebellion, in the Republic of Mexico, and of the citizens of said Republic of Mexico, against the Government and authority there, and the furnishing of arms, munitions, supplies and money for carrying on and supporting such rebellion, and an enterprise which was to be carried on from Tucson, Arizona, aforesaid, by the said defendants devising the plans of the same there. The said conspiracy, combination, confederation and agreement was continuously, throughout all of the times in this indictment mentioned, in operation and existence." "And the Grand Jurors, on their oaths, do further represent that in furtherance of said conspiracy, and to effect the object and purpose thereof, and on or about the 25th day of May, 1927, near Tucson, in the State and District aforesaid, the said defendants Jose Gandara and Bishop Navarette did meet with certain Yaqui Indians and did urge said Yaqui Indians to band together and form a warlike enterprise, and did urge, exhort and entice said Yaqui Indians to prepare to enter the said Republic of Mexico from the said State of [164—122] Arizona under the leadership of the said Jose Gandara, and to make war upon the said Republic of Mexico," and to commit and do other overt acts set forth in the indictment, which were read to you at the beginning of the trial, and which you will be free to read when you retire to consider your findings—and you will be furnished with the original indictment for that purpose. I think it is unnecessary that I should

read them, in view of these facts.

Now, bear in mind that the offense with which these defendants are charged is that of a conspiracy. It is alleged and claimed by the Government that the offense which they conspired to commit was a violation of Section 13 of the Criminal Code, and it is alleged in the indictment that they did conspire to violate the law of the United States in that they did conspire to violate said Section 13.

Now, in order for you to properly determine the issue of the guilt or innocence of the defendants in this case, it will be necessary that I read that section of the law to you and explain what it takes to constitute the offense under that law. That section, as amended, is as follows:

"Whoever, within the territory or jurisdiction of the United States or any of its possessions, knowingly begins or sets on foot, or provides or prepares a means for or furnishes the money for, or who takes a part in, any military or naval expedition or enterprise to be carried on from thence,"—that is, from the United States—"against the territory or dominion of any foreign prince or state, or of any colony, district or people with whom the United States is at peace, shall be punished" as therein provided.

You will observe, Gentlemen, that the enumerated acts which constitute the offense under this Section 13, are all in the disjunctive. To begin the military expedition spoken of is an offense within the statute. To begin it is to do the first act which may lead to the enterprise. The offense is consummated

by any overt act [165—123] which shall be a commencement of the expedition, though it should not be prosecuted. Or, if an individual shall "set the expedition on foot," which is scarcely distinguishable from beginning it. To set it on foot may imply some progress beyond that of beginning it. Any combination of individuals to carry on the expedition is "setting it on foot" and the contribution of money or anything else which shall induce such combination may be a beginning of the enterprise.

To provide the means for such an enterprise is within the statute. To constitute this offense, the individual need not engage personally in the expedition. If he furnish the munitions of war, provisions, transportation, clothing, or any other necessaries to men engaged in the expedition, he is guilty, for he provides the means to carry on the expedition.

It must be a nation or people with whom we are at peace. "In passing the above law, Congress has performed a high national duty"—and in quoting this I am reading from a charge of one of the Judges of the Supreme Court. "A nation, by the laws of nations, is considered a moral being, and the principle which imposes moral restraints on the conduct of an individual applies with greater force to the actions of a nation."

"Justice," says Vattel—who, by the way, was one of the great authorities on International Law and wrote a celebrated work on International Law—"is the basis of society, the sure bond of all commerce. Human society, far from being an intercourse of

assistance and good offices, would be no longer anything but a vast scene of robbery, if there were no respect to this virtue, which secures to every one his own."

"It is still more necessary between nations than between individuals, because injustice produces more dreadful consequences in the quarrels of these powerful bodies politic, and it is still more difficult to obtain redress." [166—124]

"Before a jury can convict, it must be proved to their satisfaction that the expedition or enterprise was in its character military; or, in other words, it must have been shown by competent proof that the design, the end, the aim, and the purpose of the expedition, or enterprise, was some military service, some attack or invasion of another people or country, state or colony as a military force."

"This statute does not require any particular number of men to band together to constitute the expedition or enterprise one of military character. There may be divisions, brigades and regiments, or there may be companies or squads of men. Mere numbers do not conclusively fix and stamp the character of the expedition as military or otherwise. A few men may be deluded with the belief of their ability to overturn an existing government or empire, and laboring under such delusion, they may enter upon the enterprise. * * * Evidence showing that the end and objects were hostile to or forcible against a nation at peace with the United States characterizes it, to all intents and purposes, as a military expedition or enterprise."

The words "military enterprise," while including a military expedition, have been held by the Supreme Court to give a wider scope to the statute than the latter term, and that a military enterprise may consequently include various undertakings by single individuals, as well as by a number of persons. It has been held that this Section does not require that the expedition should have actually set out or any particular number of men, the crime being completed by the organization only. The words, "to be carried on from thence" are employed in the sense of carrying out, or forward, "from thence."

Reading again from a case considering this statute, "The statute defines the offense disjunctively as committed by every person who, within the territory or jurisdiction of the United States, knowingly begins, or sets on foot or provides or prepares [167—125] a means for, or furnishes the money for, or who takes part in, any military or naval expedition or enterprise to be carried on from thence, against the territory or dominion of any foreign state, district or people with whom the United States is at peace."

"Begin is to do the first act, to enter upon; to begin an enterprise is to take the first step; the initiatory movement of an enterprise, the very formation and commencement of an expedition. To 'set on foot' is to arrange, to place in order, to set forward, to put in way of being ready. To provide is to furnish and supply; and 'to procure means' is to obtain, bring together, put on board, to collect."

"The beginning, the setting on foot, or the providing or procuring materials for such an expedition or enterprise must be within the territory or jurisdiction of the United States, and to be carried on from thence, against the territory or dominions of some foreign state, colony, district or people, with whom the United States were at peace."

"A single individual may begin or set on foot a military expedition or enterprise, and a single individual may provide or prepare the means for such an expedition or enterprise."

"Everything must have a beginning."

So much for the section which these defendants are charged with conspiring to violate.

And I might add here, Gentlemen, that the Mexican Government is not on trial in this case. The Government of the United States is now and was, during all of May and June of this year, at peace with Mexico. And this is true, regardless of the fact, if it be a fact, that occasionally the relations between them call for conversations or conferences.

And citizens of the United States and residents thereof who are not citizens should be careful to do nothing that might tend to disturb our friendly relations with that nation. [168—126]

While this is true, only those who are proven guilty of a violation of this statute should be convicted.

Having explained to you the law which these defendants are charged with having conspired to violate we now will consider the conspiracy charge set forth in the indictment.

A conspiracy consists of a combination between two or more persons for the purpose of accomplishing a criminal or unlawful object, and in this connection I charge you, as a matter of law, that the objects of the conspiracy charged in the indictment, that is, the violation of this neutrality law which I have just read to you, were unlawful objects. And this is true, notwithstanding the fact, if it be a fact, that a number—I believe the number was admitted to be between one hundred and forty and one hundred and fifty Yaqui Indians, may have come to the United States for the purpose of procuring arms and ammunition or may have been recently engaged in making war on the Republic of Mexico, in Mexico, before they arrived in the United States.

The conspiracy is alleged to have been formed between the first day of May, 1927, and the 20th day of June, 1927. June 19th, therefore, is the last day of the alleged period of the conspiracy.

"In all cases of conspiracy, the act of one conspirator, in the prosecution of the enterprise, is considered the act of all, and is evidence against all. But only those acts and declarations are admissible under this rule, which are done and made while the conspiracy is pending, and in furtherance of its object."

After the conspiracy has come to an end, whether by success or failure, the admissions of one conspirator, by way of narrative of past facts or events, are not admissible in evidence against the others. Evidence of acts and declarations made by Gandara

or any other person after June 19th are not admissible against the defendant Borgaro, and should not be considered against him, nor are they admissible against Gandara as testimony tending to establish or proof of a conspiracy, but acts and declarations made by Gandara after [169—127] June 19th are admissible against him solely for the purpose of throwing light upon his acts and conduct during the existence of the conspiracy, if there was a conspiracy, as charged in the indictment, between the first day of May, 1927, and the 20th day of June, 1927, as admissions against interest. [170—128]

You will observe, Gentlemen, that the indictment alleges that the conspiracy was formed among Jose Gandara, Esteben Borgaro, Junior, Antonio Valenzuela, *alias* Chito Valenzuela, and Bishop Navarette and the charge is that they did combine and confederate together to violate the laws of the United States, and with divers other persons, whose names are to the Grand Jurors unknown, so that in order to convict, in the event that you do not find both of these defendants guilty of the conspiracy you might find one of them guilty—in other words, if these two men did not conspire, as charged in the indictment, between themselves, but you believe that one of them did conspire with one of the other persons named in the indictment, or with those whose names are to the Grand Jurors unknown,—for instance, one or more of the Yaqui Indians—then, one of the defendants may be found guilty, the one so conspiring, and the other acquitted.

In other words, if the defendant Gandara conspired with the Yaqui Indians or any other person and not with Borgaro, he might be convicted and Borgaro acquitted, and if Borgaro conspired with Chito Valenzuela, knowing that conspiracy and the object thereof, or with any other person other than Gandara, he might be convicted.

To sustain a charge of conspiracy, the Government need not furnish direct proof of the unlawful plan or agreement, that is, an eye-witness, but such charge may be sustained by evidence showing a concert of action in the commission of an unlawful act, or by proof of other facts from which the natural inference arises that the unlawful overt act was in furtherance of a common design of the alleged conspirators.

The offense charged in the indictment depends in no way upon the success of the conspiracy. It is not at all necessary that the object of the conspiracy be accomplished. It does not follow that because a conspiracy to commit an unlawful act embraces an unsuccessful attempt, it is not a crime punishable under the law. The conspiracy is the offense which the statute defines without reference to whether the crime which the conspirators have conspired to commit is consummated. [171—129]

It is not necessary, in order to constitute a conspiracy, that all of the conspirators should have agreed upon the unlawful object to be accomplished at one and the same time. And likewise, it is not necessary to constitute a conspiracy, that two or

more persons should meet together and enter into any explicit or formal agreement for the unlawful scheme, or that they should directly, or by words or in writing, state what the unlawful scheme is to be, and the details of the plans or means by which the unlawful combination is to be made effective. It is sufficient if two or more persons in any manner, or through any contrivance positively or tacitly come to a mutual understanding to accomplish a common and unlawful design. A tacit understanding is one which, although not expressed, arises from the nature of things. A mere agreement or combination to effect an unlawful purpose not followed by an act done by either of the parties to carry into execution the object of the conspiracy, does not constitute the offense. There must be both the unlawful agreement or combination and an act or acts done by one or more of the parties to effect the illegal object or design agreed upon to make the offense punishable under the statute.

In other words, the Government must show, first, the conspiracy or acts from which the conspiracy may be inferred or arrived at, and it then must prove what is known as the overt act was done to carry into effect or to consummate the object of the conspiracy. The Government has alleged in the indictment that these defendants committed ten overt acts in furtherance of the conspiracy. It is not necessary that the Government should prove that they did commit all ten of these acts. It will be sufficient, if the conspiracy is established, if the Government were to prove that one overt act, men-

tioned in the indictment, was committed, and while only ten have been alleged and only one needs to be proven, others not mentioned in the indictment may be proven.

The elements of the crime of conspiracy are: One, an object to be accomplished, which in this case must be the commission of an offense against the United States; a violation of Section 13 of the Penal Code, the neutrality law which I have just read; two, a plan or scheme embodying the means to accomplish the object and, three, an agreement or understanding between two or more persons, [172—130] whereby they become definitely committed to co-operate for the accomplishment of the object by the means embodied in the scheme, or by any effectual means. Fourth, an overt act, set forth in the indictment, by one or more of the conspirators to effect the objects of the conspiracy. As I said before, those overt acts are set forth in the indictment and are numbered from one to ten, inclusive.

To require an overt act to be proven against every member of the conspiracy, or a distinct act connecting him with the combination, would not only be an innovation upon established principles but would render most prosecutions for the offense nugatory.

Guilty connection with the conspiracy may be established by showing association by the persons accused in and for the purpose of prosecution of the illegal object. Each party must be actuated by an intent to promote the common design, but each may

perform separate acts or hold distinct relations in forwarding that design.

And on the question of intent, it is the law that the intent with which an act is committed, being but a mental state of the parties accused, direct proof of it is not required nor, indeed, can it be ordinarily shown, but it is generally derived from and established by all the facts and circumstances attending the doing of the act complained of, as disclosed by the evidence, and in order for you to determine in this case, the question of the intent,—the intent with which one of the overt acts was performed, for instance,—you may look to all the evidence in the case. There must be an intentional participation in the transaction or transactions, or some of them, with a view to furthering the common design and purpose. If persons work together, though performing separate acts, to advance an unlawful scheme, having its promotion in view and actuated by the common purpose of accomplishing the unlawful end, they are conspirators.

You have already gathered from what I have said, Gentlemen, that where several parties conspire or combine together in a conspiracy, each is criminally responsible for any act of his associate or associates done to effect the [173—131] object of the crime. In such cases, in contemplation of law, the act of one is the act of all. That is, of course, limited to the time during the existence of the conspiracy, and I have already charged you that any statement made by one of the defendants, in the absence of the other defendant, after the ter-

mination of the conspiracy, was not evidence against the absent defendant nor is it evidence against the defendant who made the statement as to the formation of the conspiracy, but as admissions against interest, tending to establish, tending to throw light upon what acts were done and the effect of such acts during the period of the conspiracy.

One person alone cannot be convicted of a conspiracy. Two may be. One may, provided that another or others are shown to be guilty with him, although not at the time on trial. In other words, in this case, if you come to the conclusion that only one of the defendants conspired with one of the absent defendants, or one of the persons whose names are unknown to the Grand Jurors, you can convict the one defendant and acquit the other; but if you believe that they conspired between themselves and any of the other persons mentioned and referred to and believe that beyond a reasonable doubt, you can return a verdict of guilty as to both.

The adequacy of the evidence in prosecutions for criminal conspiracy, to prove the existence of such a conspiracy, like other questions of the weight of evidence, is a question for the jury.

One may join a conspiracy either at the time it is formed or thereafter, and he may join it by acts or words. One may unlawfully join a conspiracy even though he does not know all his co-conspirators, and if one knowingly and unlawfully joins a conspiracy which has already been formed by others, knowing the objects thereof, he thereby adopts all the acts and declarations of his co-con-

spirators done or made for the purpose of accomplishing the object of the conspiracy, whether they are so done or after he so joins the conspiracy. And of course, as I have said before, when the joint enterprise is at an end, [174—132] whether by accomplishment, or by abandonment, no one of those engaged therein may, by any subsequent acts or declaration affect the others.

The charge of conspiracy is limited by the terms of the indictment itself. The indictment here charges but one combination or conspiracy, however diverse its objects, and no defendant could be convicted thereunder unless he was shown to be a member of or party of that conspiracy.

Furthermore, the scope of a conspiracy must be gathered from the testimony and not from the averments of the indictment. The latter may limit the scope, but cannot extend it.

It is claimed by the defendants on trial in this case that there was no conspiracy at any time. This presents a question of fact for you to determine.

The granting or refusing to grant motions to dismiss as to any of the defendants in this case, must not be taken by the jury as indicating in any way the opinion of the Court as to the guilt or innocence of any of the defendants now on trial, and you should entirely disregard the same in arriving at your verdict. Each defendant has the right to have the evidence separately considered and applied to him.

The indictment is a mere formal accusation against the defendants. It is no evidence of their guilt. It does not impair the presumption of innocence and no juror should permit himself to be influenced against the defendants because of or on account of said indictment.

In order to convict the defendants, or either of them, of the crime charged in the indictment, it is incumbent upon the United States to satisfy you beyond a reasonable doubt of the truth of every material allegation of the indictment. The law raises no presumption against the defendants, but every presumption of the law is in favor of their innocence. This presumption of innocence continues throughout the trial and until such time, if there be such a time, as the jury finds that they have been proven guilty, beyond a reasonable doubt. When that time arrives in the case, if it does arrive, then that presumption of innocence no longer prevails. [175—133]

Any Yaqui Indians participating with the defendant Gandara in any arrangement for furnishing arms or munitions if such was in violation of the laws of the United States, would be what in law is termed an accomplice. If any of the witnesses testifying for the Government are of that class, they are accomplices. The testimony of an accomplice, while admissible and to be considered by the jury for whatever they may think it worth, if anything, should not under ordinary circumstances be the sole basis of a conviction, by the jury, before con-

victing upon the uncorroborated testimony of accomplices, should consider very carefully the testimony of such accomplices and not convict on such testimony unless they are thoroughly satisfied beyond a reasonable doubt of the truth of such testimony.

As I stated before, before you can find the defendants, or either of them, guilty, you must find their or his guilt beyond a reasonable doubt. A reasonable doubt, as applied to evidence in criminal cases, is such a doubt as you may entertain as reasonable men, after a thorough review and consideration of all the evidence, a doubt for which a reason arising from the evidence, or the want of evidence, exists. It is not a mere possibility of a doubt, an imaginary doubt, but a serious, substantial, well-founded doubt, growing out of the evidence, or the want of it, in the case. While it is true that the Government is required to prove the guilt of the defendant or defendants beyond a reasonable doubt, it is not required to prove his or their guilt to a mathematical certainty. Such a thing as mathematical certainty cannot exist in the enforcement of law. Proof of this character is rarely obtainable in human investigations. All that courts and juries can act upon is belief to a moral certainty. It has been said that everything relating to human affairs and depending upon mortal testimony is open to some possible or imaginary doubt.

There are two classes of evidence recognized and admitted in courts of justice, upon either of which

juries may lawfully find an accused guilty of crime. One is direct or positive testimony of an eye-witness to the transaction or the commission of the crime, and the other is proof by testimony of [176—134] a chain of circumstances pointing sufficiently strong to the commission of the crime by the defendant and which is known as circumstantial evidence. Such evidence may consist of plans laid for the commission of the crime, or any other acts, declarations or circumstances admitted in evidence, tending to connect the defendant or defendants with the commission of the crime. Circumstantial evidence is proof of certain facts and circumstances in any certain case, from which the jury may infer other and connected facts, which usually and reasonably follow according to the common experience of mankind.

Crime may be proved by circumstantial evidence as well as by direct testimony of eye-witnesses; but the facts and circumstances in evidence should be consistent with each other and with the guilt of the defendant, and wholly inconsistent with any reasonable theory of the defendant's innocence. In circumstantial evidence it is not necessary that each circumstance relied upon be proved by the same weight and force of evidence, and be as convincing in its conclusiveness of guilt as though it were the main issue in the case, but the circumstances may be combined together and thereby give strength to each other. As to the weight and sufficiency of such evidence, that is a matter for the jury to determine.

I charge you, Gentlemen, that you are made by law the sole judges of the facts in this case and of the credibility of each and all of the witnesses who have testified before you, and of the weight you will give to the testimony of the several witnesses who have testified in the case.

In determining the credibility of any witness and the weight you will give to his testimony, you have the right to take into consideration his manner and appearance while giving his testimony, his means of knowledge, any interest or motive which he may have in the result of the case, if any be shown, and the probability or improbability of the truth of his statement, when considered in connection with all the other facts and circumstances in the case. If you believe any witness has wilfully sworn falsely as to any material fact [177—135] in the case, then you have the right to entirely disregard the testimony of such witness, except in so far as his statements may be corroborated by other credible evidence in the case and by the facts and circumstances in evidence.

The law permits the defendants, at their own request, to testify in their own defense. The defendants herein have availed themselves of this right. Their testimony is before you, and should be considered as the testimony of any other witness, taking into consideration the fact that they are the defendants and are interested in the result of this trial, and, if convicted, will be required to suffer whatever punishment the court may under the circumstances of the case, feel constrained to impose.

They should not, however, be disbelieved merely because they are the defendants, and interested.

You will consider all of the testimony, look at it from a reasonable standpoint, and take into consideration all the facts and determine what credit should be given to the testimony of the several witnesses. It is for you to determine whether any of them have wilfully sworn falsely, or whether they have withheld the facts, or perverted the facts and, if so, their motive or purpose in so doing.

I wish to further say that no opinion expressed by the Court, or comment made by the Court, if it carries with it an opinion regarding the facts, should be given any consideration by the jury in determining what the facts are, for you and you alone are the sole judges of the facts. The Court instructs you as to the law and it is your duty to follow the instructions of the Court, but the Court expresses no opinions as to the facts You must find the facts for yourselves.

I now submit the case to you, Gentlemen, reminding you of its importance. If the evidence of the defendants' guilt is not entirely clear, then they should certainly be acquitted, and if it is entirely clear, they should certainly be convicted. No sympathy or prejudice must be allowed to influence you in passing on this case. You will render your verdict of guilty or not guilty and let the consequences be what they may. You are concerned only in the proper enforcement of the law and protecting those who are on trial. [178—136]

BE IT REMEMBERED that during the trial of this cause further proceedings were had as follows:

The COURT.—Any exceptions to the charge?

Mr. HILZINGER.—You asked us to call your attention with reference to Mr. Borgaro in the course of his business as a merchant, making sale.

The COURT.—I omitted that, but I had made a note of it. Gentlemen of the Jury, it is not a crime for anyone to sell, in the United States, rifles or ammunition in the ordinary course of business. Whether the sales made by the defendant Borgaro were in the ordinary course of business is for the determination of the jury, from all of the evidence, direct and circumstantial.

The COURT.—Any exceptions?

Mr. BARRY.—If your Honor please, I understand that the requested instruction Number One, which we asked be given with reference to the law as based on the Trumbull case, has not been given, and we except to the refusal to give that instruction.

The COURT.—You may have that exception.

Mr. RICHEY.—Does that include each of the defendants?

The COURT.—It does.

The COURT.—Gentlemen, four forms of verdict have been prepared. If you find the defendant Esteban Borgaro, Jr., guilty, you will use this form of verdict,—"We, the jury, duly empaneled and sworn in the above entitled action, on our

oaths do find the defendant guilty in the manner and form as charged in the indictment."

If you do not believe that his guilt has been established beyond a reasonable doubt, the form of your verdict will be,—"We, the jury, duly empaneled and sworn in the above-entitled action, upon our oaths do find the defendant not guilty."

Similar forms of verdict will be furnished you for the defendant Gandara.

You will cause your verdict to be signed by your foreman, whom you will select upon going into your room, and of course you understand, in criminal cases, all verdicts must be unanimous. I will now give you the indictment [179—137] and also the forms of verdict, which you will take to the jury-room, and you will occupy the room to the right side, which has been provided for you.

You will also as a matter of form sign a verdict of not guilty as to the defendant Navarette, the Court having determined that the evidence against him is not sufficient to establish his guilt as a conspirator.

* * * * * * * * *

Thereupon the jury retired in custody of the marshal to consider their verdict, and subsequently returned into court, and returned the verdict shown in the transcript herein, to which reference is made.

* * * * * * * * *

BE IT REMEMBERED, that the above and foregoing sets out truly and correctly all of the evidence introduced upon the trial of this cause, and

truly and correctly sets out the matters and things and proceedings involved in this cause, and the defendant respectfully prays that this his bill of exceptions be by the Court settled, allowed, approved, signed and ordered filed, and made a part of the record herein.

JAMES D. BARRY,
W. H. FRYER,
Attorneys for Defendant. [180—138]

CERTIFICATE OF JUDGE TO BILL OF EXCEPTIONS.

On this 27 day of April, A. D. 1928, the above and foregoing bill of exceptions having been presented to me, and having been by me found to be correct, it is hereby in all respects settled, approved, allowed, signed and ordered filed and made a part of the record in this cause.

WM. H. SAWTELLE,
United States District Judge for the District of Arizona.

[Indorsements]: Filed Apr. 27, 1928. [181—139]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the United States District Court for the District of Arizona.

You will please prepare a transcript of the record in the above-entitled cause to be filed in the

office of the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit under the writ of error of said Court in said cause, and include in said transcript the following proceedings, pleadings, papers, records and files, to wit:

Indictment;

Transcript of minute entries;

Bill of exceptions, including charge of Court to jury;

Defendant's special requested instruction, No. 1;

Verdict of jury;

Judgment and sentence;

Assignments of error;

Petition for writ of error;

Order allowing writ of error;

Writ of error bond or cost bond;

Order fixing amount of bail bond;

Appearance bond on writ of error;

Writ of error;

Citation;

Praecipe for transcript of record; [182]

Stipulations for extension of time to file bill of exceptions;

Orders extending time to file bill of exceptions;

Stipulations for extension of time for filing record and docketing cause in the Circuit Court of Appeals;

Orders extending time for filing record and docketing cause in the Circuit Court of Appeals

—and all other records, entries, pleadings, proceedings, papers and filings necessary or proper to

make a complete record upon said writ of error in said cause.

JAMES D. BARRY,
W. H. FRYER,
Attorneys for Defendant.

Service of a copy of the foregoing praecipe is hereby admitted this 23 day of April, 1928.

CLARENCE V. PERRIN,
Assistant U. S. District Attorney.

[Indorsements]: Filed Apr. 23, 1928. [183]

[Title of Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

United States of America,
District of Arizona,—ss.

I, C. R. McFall, Clerk of the District Court of the United States for the District of Arizona, do hereby certify that I am the custodian of the records, papers and files of said court, including the records, papers and files in the case of the United States of America, Plaintiff, *versus* Jose Gandara, Defendant, No. C.—3446 (Tucson).

I further certify that the attached pages, numbered one to one hundred and eighty-three, inclusive, contain a full, true and correct transcript of the proceedings in said case and of all papers filed therein, together with the indorsements of filing thereon, called for and designated in the

praecipe filed in said case and made a part of the transcript attached hereto, as the same appear from the originals of record and on file in my office as such Clerk in the city of Tucson, State and District aforesaid.

I further certify that the Clerk's fee for preparing, and certifying to, this said transcript amounts to the sum of Thirty-eight and 20/100 ($38.20) Dollars, and that said sum has been paid to me by counsel for the defendants.

I further certify that the original writ of error and citation issued in said cause, together with the original orders made and signed by the Judge of said court enlarging the time to docket this case with the United States Circuit Court of Appeals, Ninth Circuit, from January 2, 1928, until May 10, 1928, are hereto attached and made a part of this record.

WITNESS my hand and the seal of said court, this 30th day of April, A. D. 1928.

C. R. McFALL.

[Seal] C. R. McFALL,

Clerk United States District Court for the District of Arizona.

[Title of Court and Cause.]

ORDER EXTENDING TIME TO AND INCLUDING FEBRUARY 1, 1928, TO FILE RECORD AND DOCKET CAUSE.

Upon motion of counsel for the defendant, Jose Gandara, and for good cause shown,—

IT IS ORDERED by the Court that the time for filing the record of said cause and docketing the same in the Circuit Court of Appeals of the Ninth Circuit be, and it is hereby, extended to and including the 1st day of February, 1928.

Dated at Tucson, Arizona, this 30th day of December, 1927.

WM. H. SAWTELLE,
Judge of Said Court.

[Endorsed]: Filed Dec. 30, 1927.

[Title of Court and Cause.]

ORDER EXTENDING TIME TO AND INCLUDING MARCH 1, 1928, TO FILE RECORD AND DOCKET CAUSE.

Upon motion of counsel for the defendant, Jose Gandara, and for good cause shown,—

IT IS ORDERED by the Court that the time for filing the record of said cause and docketing the same in the Circuit Court of Appeals of the Ninth Circuit be, and it is hereby, extended to and including the 1st day of March, 1928.

Dated at Tucson, Arizona, this 14th day of January, 1928.

WM. H. SAWTELLE,
Judge of Said Court.

[Endorsed]: Filed Jan. 14, 1928.

[Title of Court and Cause.]

ORDER EXTENDING TIME TO AND INCLUDING MARCH 31, 1928, TO FILE RECORD AND DOCKET CAUSE.

Upon motion of counsel for the respective parties above named, and for good cause shown,—

IT IS ORDERED by the Court that the time for filing the record of said cause and docketing the same in the Circuit Court of Appeals of the Ninth Circuit be, and it is hereby, extended to and including the 31st day of March, 1928.

Done at Tucson, Arizona, this 29th day of February, 1928.

WM. H. SAWTELLE,
Judge of the United States District Court for the District of Arizona.

[Endorsed]: Filed Feb. 29, 1928.

[Title of Court and Cause.]

ORDER EXTENDING TIME TO AND INCLUDING MAY 1, 1928, TO FILE RECORD AND DOCKET CAUSE.

Upon motion of counsel for the respective parties above named, and for good cause shown,—

IT IS ORDERED by the Court that the time for filing the record of said cause and docketing the same in the Circuit Court of Appeals of the

Ninth Circuit be, and it is hereby, extended to and including the 1st day of May, 1928.

Done at Tucson, Arizona, this 4th day of April, 1928.

WM. H. SAWTELLE,
Judge of the United States District Court for the District of Arizona.

[Endorsed]: Filed Apr. 4, 1928.

[Title of Court and Cause.]

ORDER EXTENDING TIME TO AND INCLUDING MAY 10, 1928, TO FILE RECORD AND DOCKET CAUSE.

Upon motion of counsel for the respective parties above named, and for good cause shown,—

IT IS ORDERED by the Court that the time for filing the record of said cause and docketing the same in the Circuit Court of Appeals of the Ninth Circuit be, and is hereby, extended to and including the 10th day of May, 1928.

Done at Tucson, Arizona, this 30th day of April, A. D. 1928.

WM. H. SAWTELLE,
Judge of the United States District Court for the District of Arizona.

[Endorsed]: Filed Apr. 30, 1928.

[Title of Court and Cause.]

CITATION ON WRIT OF ERROR.

The President of the United States, to the United States of America, Defendant in Error, GREETING:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, within thirty days from the date hereof, pursuant to a writ of error sued out and filed in the office of the Clerk of the District Court of the United States for the District of Arizona, in the cause wherein Jose Gandara is plaintiff in error and the United States is defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable WILLIAM HOWARD TAFT, Chief Justice of the United States, this the 3d day of December, in the year of our Lord one thousand nine hundred and twenty-seven.

WM. H. SAWTELLE,
United States District Judge.

[Seal] Attest: C. R. McFALL.
Clerk of the United States District Judge.

I hereby, this the 3d day of December, A. D. 1927, accept due personal service of the foregoing cita-

tion, on behalf of the United States of America, defendant in error.

_____,

United States Attorney for the District of Arizona.

CLARENCE V. PERRIN,
Assistant United States Attorney.

[Endorsed]: Filed Dec. 3, 1927.

United States Circuit Court of Appeals for the Ninth Circuit.

The United States of America,
Ninth Judicial Circuit,—ss.

WRIT OF ERROR.

The President of the United States, to the Honorable Judge of the District Court of the United States, for the District of Arizona, GREETING:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court of the United States, before you, or some of you, between Jose Gandara, plaintiff in error, and the United States of America, defendant in error, manifest error hath happened, to the great damage of the said Jose Gandara, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the party aforesaid in this behalf, do command you, if judg-

ment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, California, within thirty days from the date hereof, in the said United States Circuit Court of Appeals, to be then and there held, and the record and proceedings aforesaid being inspected, the said United States Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

WITNESS the Honorable WILLIAM HOWARD TAFT, Chief Justice of the United States, the 3d day of December, in the year of our Lord one thousand nine hundred and twenty-seven.

[Seal] C. R. McFALL,
Clerk of the District Court of the United States,
for the District of Arizona.

Allowed this the 3d day of December, A. D. 1927.

WM. H. SAWTELLE,
U. S. District Judge.

The answer of the Judge of the District Court of the United States for the District of Arizona, to the within writ of error:

As within commanded, I certify under the seal of my said District Court, in a certain schedule to this writ annexed, the record and all proceedings of the plaintiff whereof mention is made within,

with all things touching the same, to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned, at the day and place within contained.

By the Court.

C. R. McFALL.

[Seal] C. R. McFALL,

Clerk U. S. District Court for the District of Arizona.

[Endorsed]: Filed Dec. 3, 1927.

[Endorsed]: No. 5483. United States Circuit Court of Appeals for the Ninth Circuit. Jose Gandara, Plaintiff in Error, vs. United States of America, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Arizona.

Filed May 3, 1928.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 5483

IN THE UNITED STATES

CIRCUIT COURT OF APPEALS

NINTH CIRCUIT

JOSE GANDARA,

Plaintiff in Error.

vs.

THE UNITED STATES OF AMERICA,

Defendant in error.

ERROR FROM THE UNITED STATES DISTRICT COURT, DISTRICT OF ARIZONA.

BRIEF FOR PLAINTIFF-IN-ERROR

JAMES D. BARRY,
FRYER & CUNNINGHAM,
Attorneys for Appellant.

M'MATH CO.

No. 5483

IN THE UNITED STATES

CIRCUIT COURT OF APPEALS

NINTH CIRCUIT

JOSE GANDARA,

Plaintiff in Error.

vs.

THE UNITED STATES OF AMERICA,

Defendant in error.

ERROR FROM THE UNITED STATES DISTRICT COURT, DISTRICT OF ARIZONA.

BRIEF FOR PLAINTIFF-IN-ERROR

The plaintiff-in-error, Jose Gandara, was indicted in Tucson, Arizona, charged with conspiracy to begin, set on foot and provide the means for a certain military enterprise against the Republic of Mexico, and was convicted.

ABSTRACT OR STATEMENT OF THE CASE

The questions involved in this appeal are:

1. The refusal of the Court to instruct the jury upon the defendant's theory of defense as requested in writing; that is to say, if they believed from the evidence, or had a reasonable doubt thereof, that a revolution or revolt was in existence in the Republic of Mexico and that the members thereof came to the United States for the purpose of securing munitions of war and provisions and then returning to Mexico, and the defendant, Gandara, furnished ammunition or provisions only for such as had come from Mexico, that then such furnishing of ammunition and provisions would not constitute beginning, setting on foot, providing or preparaing the means for a military enterprise, and that then, and in that event, if the jury so found, they should acquit the defendant on the charge of conspiracy. (Tr. p. 38).

2. The refusal of the Court to instruct the jury to find the defendant not guilty on the ground that there was insufficient evidence to sustain a conviction, said motion being made when the Government rested, and renewed at the close of the case. (Tr. pp. 14, 15, and 210).

ASSIGNMENT OF ERROR NO. ONE

(Tr. pp. 28-29)

Because the Court erred in overruling the defendant's exception to the Court's charge for its failure to charge the jury upon defendant's theory of defense that if a military enterprise or expedition had been begun or set on foot in Mexico, and the acts alleged to have been done by the defendant were done in a conspiracy in connection with such an expedition, then he should be acquitted.

ASSIGNMENT OF ERROR NO. TWO

(Tr. pp. 29-30)

Because the Court erred in refusing to give to the jury defendant's special requested instruction No. 1, submitting defendant's theory of defense to the effect that if the jury believed that a military expedition had been already begun or set on foot in Mexico and the members thereof had come to the United States for ammunition and supplies with the purpose and intention to return to Mexico, and that the defendant conspired to furnish arms and ammunition to such expedition, he would not be guilty of an offense under the charge as laid in the indictment, said requested instruction reading as follows:

"Gentlemen of the Jury:

The jury are instructed, if prior to the commission of any of the acts charged in the indictment, a revolution or revolt of the Yaqui Indians was in existence in the Republic of Mexico in which armed forces of the said Indians were in conflict with the military forces of the Mexican government, and if members of such armed forces of the Yaqui Indians came to the United States for the purpose of securing munitions of war and provisions, and then returning to rejoin the forces of such Indians in Mexico, and the defendant Gandara furnished ammunition or provisions only for such Indians as had come from Mexico, and intended to return to Mexico, and not to recruit or secure other Indians to go to Mexico, then such furnishing of ammunition and provisions would not constitute either a military enterprise or a military expedition as those terms are used in the statute of the United States on which this prosecution is based, and the defendant, Gandara, would

not be guilty of beginning, setting on foot, or furnishing means for any military expedition or military enterprise, and a conspiracy merely to furnish ammunition and provisions to Yaqui Indians who had come from Mexico and were intending to return to Mexico under the circumstances above mentioned, would not be an offense against the United States."

Which special requested instruction was refused by the Court, to which action the defendant then and there excepted, and said requested instruction was marked refused and ordered filed.

ARGUMENT

While the Court instructed the jury generally on the law of conspiracy and on the neutrality statute, the defendant, by the timely presentation of Special Instruction No. 1, called the Court's attention to the Court's failure to charge on the defendant's theory of defense. This was likewise called to the Court's attention by defendant's exception to the Court's charge for its failure to submit the defendant's theory.

The defendant's contention is that he did not violate any law of the United States, nor did he conspire to begin, set on foot or provide or prepare the means for a military enterprise to be carried on from the State of Arizona against the Republic of Mexico. In other words, his contention is (and the evidence clearly shows) that a party of insurgents or revolutionists came to the United States to procure arms and ammunitions to take back with them to continue their revolutionary activities, and that the defendant's acts were exclusively with such enterprise.

In support of the above proposition, we feel it is desir-

able to quote at length the testimony demonstrating that such was the case.

Guadalupe Flores, a witness for the Government, testified (Tr. p. 77) as follows:

> "I have been here a short time. I was one of the Yaqui Indians who came from Mexico in April or May. And I came on the American side. Twenty-two men came with me. They were not picked up by the officers along the line; they didn't pick us up. *We came right to Tucson, twenty-two of us. And we were not apprehended or put in jail at all. We came up here for rifles and ammunition. We had been fighting in Mexico. We had been fighting there a long time. Five years. I, myself, had been fighting for five years. There are some thousands of Yaquis up in the mountains in Sonora. More than about two or three thousand, and the Mexican Government has been taking their lands away in the Yaqui Valley, and that is the reason we were fighting.*"

Likewise, the testimony of Francisco Feliz, a witness for the Government, who testified (Tr. pp. 70-71) as follows:

> "This house of mine is a meeting place for the Yaquis who came out of Sonora along in April or May of this year. As to how many of these Yaquis were there that came up from Sonora. There were several. I didn't count them. I think there were probably fifty all together. I didn't count them. There may have been one hundred. And they would meet quite frequently at my house. They came to my house because they were Yaquis and I let them stay at the house for the reason that they were hard up and I let them stay there and harbored them in my house. *And these men had been engaged in a revolution in Sonora prior to the time they came up there and they were after them. They had been fighting before they came here and they were right after them. They came here for the purpose of getting arms and ammunition to take back and go back and fight. That is true; they didn't come because they wanted to come. Juan Frias told me that he had a company here that was going to furnish him all of that stuff and that is what they came up here for—to get that stuff and go back and fight.* Some of those Yaquis have gone back—a few of them; I have not counted how many

are left here now. They have got scattered around. Nobody ever asked me to go down and fight during this period. *The truth of the matter is that these men come up from Mexico and they had been engaged in a revolution there* and some of them have went back.

"Gandara told the Yaquis who had come from the Yaqui River that he was going to help them. (Tr. p. 69). Gandara said he was going to go along with the other men to Mexico (Tr. p. 70). *I know that the Yaquis had been in a revolution for a long time against the Mexican Government. The Mexican Government had taken their lands from them, and they were trying to get back what was their's, and that is what those men who came to my house had been fighting for down there. They followed them around wherever they hid themselves; they have got to help themselves some way.* (Tr. p. 73). * * * *I have told Mr. Hilzinger, counsel for defendant, that they had not talked to any of the Yaquis down there except the ones who were going back to Mexico.* * * * *The Yaquis said the Mexican Government had taken the lands away from the Yaquis and they are up in the mountains—they are after them, right after them all the time."* (Tr. pp. 74-75).

And further, Antonio Molino, a witness for the Government, testified (Tr. pp. 60-61) as follows:

"All the world knows that a large force of Yaquis—about one hundred and fifty in number—came over from Mexico along in April or May of this year, and as a matter of fact, I know that those Yaquis came up from Mexico in order to get a supply of ammunition to take back to the other forces of the Yaquis in Sonora, and that this was their purpose in coming here, and they were going back again. Bishop Navarette went to Chico Feliz's house and Chico Feliz was there and a crowd of about thirty-five Yaquis who had come up from Sonora to receive this ammunition. There was about thirty-five Yaquis in my house, and I was harboring these people there myself. I was harboring them because of sympathy and the way they looked. Their clothes were all torn and ragged. * * * At our home in Mexico, we could not live. We could not own our homes. There is no way for us to own our own homes. If we go to work and raise one or two or three cows, then the Government comes in and takes it away from us. If we raise one hundred sacks of grain, it would be all taken away."

José Esteban Riveras, a witness for the Government, testified as follows:

> "I came to the United States the last time on the 10th of May. I remained down in the Yaqui Valley for some time. I remained there the last time about eight months. *We were fighting down there.* Five men came back to the United States with me in May —only one family. *And we were armed at the time that we came across.* (The witness was asked by counsel to look in that bunch of old guns and pick out the guns that they had, if he could, and he replied): "My rifle, I throwed it away because it was too old. I was born down in the Yaqui country. During the course of the last ten years I have been going and coming all the time. *I would go down to the Yaqui Valley and fight a while and then come back to the United States, get some money, provisions, ammunition and rifle, and go back and fight some more.*" (Tr. pp. 120-121). * * *
>
> *"Gandara told us that he wanted to go back with us Yaquis to Mexico. All the men that he could gather around there were going with him and they were all the Yaquis who had come up from Mexico and had been fighting there before."* (Tr. p. 124).

Jesus Riveras, a witness for the Government, testified as follows:

> "I came to the United States in May. *I had been fighting down in the Yaqui country,* and I came up with my father, Jose Esteben Riveras. There were many fighting down there before. *I had been fighting for about a month and we were coming up here to get ammunition to go back there and fight.* I had been fighting with the Mexicans just a little and then I came with my father." (Tr. p. 128).

And the defendant, Jose Gandara, testified as follows:

> "The Yaquis that I came to see were all from Mexico, but I didn't want to talk—that is, I wanted to get in touch with the Yaquis from Mexico, and I came here for the purpose of finding from the Yaquis here how I could get in touch with the Yaquis in Mexico." (Tr. p. 168). * * * *"They came here to Tucson to get all the supplies they could and to go back."* * * * *"They came from the Yaqui River. They were armed; they were part of the band that fought General Armenta. Their object in coming out of Mexico from*

the battle to Tucson was to get arms and munitions, mostly ammunition. As to arms, they had them, for there has been possibly forty or fifty million rifles imported into Mexico since 1910, according to general information." (Tr. pp. 169-170). * * * "As to what was my object in seeing these Yaquis who had come up from the rebellion in Mexico, I wanted to go back to the Yaqui River with them, to talk to the chiefs down there, and my purpose in coming to Tucson was to get the older men of the tribe, which is their authority, to give me some sort of recommendation or document that would introduce me to the chiefs of the Yaquis in Mexico. * * * I expected to go with those Yaquis on foot; that is the only way they travel." (Tr. p. 172). * * * "Subsequent to my interviews with these Yaquis, I obtained ammunition. That was approximately about—around the middle of June, or perhaps a little before. I brought ten thousand rounds, or about eight or ten thousand rounds from El Paso of seven millimeter ammunition. As to why I got seven millimeter ammunition that is the arms that the Yaquis have." (Tr. p. 172).

AUTHORITIES

Calderon vs. U. S. 279 Fed. 556.
Bird vs. U. S. 180 U. S. 356.
Hendrey vs. U. S. 233 Fed. 5.

There were two reasons why the requested charge on defendant's theory should have been given, viz:

FIRST: The charge, as prepared, submitted the issue to the jury along the lines of and in conformity with the law as laid down in U. S. vs. Trumbull, 48 Fed. 99. In that case, Judge Ross, in referring to the statute in question, said:

"The very terms of that statute imply that the military expeditions or enterprises thereby prohibited are such as originate within the limits of the United States and are to be carried on from this country. "Every person who, within the limits or jurisdiction of the United States, begins or sets on foot or provides or prepares the means for any military expedition or enterprise to be carried on from thence,—that is to say, from the United States,—is the language of the statute. If the evidence shows that in this case

there ever was any military expedition begun or set on foot or provided or prepared for within the sense of this statute, it was begun, set on foot, provided and prepared for in Chile and was to be carried on from Chile and not from the United States. But I think it perfectly clear that the sending of a ship from Chile to the United States to take on board arms and ammunition purchased in this country and carry them back to Chile, is not the beginning, setting on foot, providing or preparing the means for any military expedition or enterprise within the meaning of Section 5286 of the Revised Statutes."

While the Statute has been amended since the date of the above decision in the Trumbull case (1891), there is nothing in the amendment which makes the Trumbull case inapplicable to the case at bar.

The soundness of the reasoning in the Trumbull case is the better exemplified if applied to the case at bar by considering the question as to whether or not the members of the party of Yaqui Indians who came from Mexico were guilty of a conspiracy to begin, set on foot, provide or prepare the means for a military enterprise to go thence to Mexico. If they were not, the one who aided them or acted with them in their activities to procure arms and ammunition would not be guilty of an offense. The entire testimony of the case, as shown by the record, was to the effect that a military expedition or revolt or rebellion had been begun or set on foot in the Republic of Mexico and was to be carried on from Mexico and not from the United States.

The opinion of Judge Ross in the Trumbull case has never been overruled and we respectfully submit that the facts of the case at bar fall within the exact terms of the construction of the Neutrality Statute therein.

If this learned Court concludes that Judge Ross was

wrong in his statement of the law, or that the facts in this case do not come within the purview of the decision, then we submit:

SECOND: A careful perusal of the indictment will reveal that it limited the charge to a conspiracy to set on foot and provide and prepare the means for an enterprise having for its objects the inciting of armed rebellion in Mexico against the Government and authority there, and the furnishing of arms, munitions, supplies and money for carrying on and supporting such rebellion. This indictment either charges no offense, or, if it charges an offense, then the defendant's theory of defense which was embodied in the requested charge, which was refused, was not submitted as an issue. We venture to suggest that it is not against the neutrality laws to set on foot and provide and prepare the means for an enterprise having for its object the inciting of armed rebellion in another country, nor is the mere furnishing of arms, munitions, supplies and money for carrying on and supporting a rebellion violative of the statute in question. This we believe is the very essence of the case at bar. The mere calling of the offense a conspiracy to set on foot, provide, etc., a military expedition to go thence is insufficient when the pleader, by well defined limitations in stating the objects of the conspiracy, sets out lawful acts, to-wit, having for its object the inciting of armed rebellion.

While we concede that where the sufficiency of an information or indictment is not questioned by demurrer or appropriate remedy, any defect of form though not of substance is cured by a verdict of guilty, yet we believe that the defect above affects the substantial rights of the de-

fendant, and to this extent the matter may be considered by the Appellate Court.

The indictment in this case follows the language of the Statute but as it proceeds to describe, with attempted precision and certainty, the offense intended to be laid, it finally charges the defendant, as hereinabove stated, with a conspiracy to set on foot and provide and prepare the means for an enterprise having for its objects the inciting of armed rebellion, but not to go thence from the United States. This indictment could not be considered as describing the offense with particularity and exactness so as to give protection to the defendant and not force him to resort to and rely on the uncertainties of extraneous proof, nor would the indictment operate as a protection against double jeopardy. (See Jarl vs. U. S. 19 Fed. (2nd) 891).

In Ledbetter vs. United States, 170 U. S. 606, the Court said:

> "We have no disposition to qualify what has already been frequently decided by this Court, that where the crime is a statutory one, it must be charged with precision and certainty and every ingredient of which it is composed must be clearly and accurately set forth, and that even in the cases of misdemeanors, the indictment must be *free from all ambiguity* and leave no doubt in the minds of the accused and the Court of the exact offense intended to be charged."

It will be noted further that the indictment contains on its face, to an aggravated degree, the fault of repugnancy, in this: that there is a contradiction between material allegations therein. That is, the indictment, intending, perhaps, to charge conspiracy to set on foot a military expedition to go thence, yet really charges a conspiracy to incite a revolt in Mexico. (See Sunderland vs. U. S. 19

Fed. (2nd) 202).

In United States vs. Howard, Federal Cases No. 15403, Mr. Justice Storey said:

> "No allegation, whether it be necessary or unnecessary, whether it be more or less particular, which is descriptive of the identity of that which is legally essential in the charge in the indictment, can ever be rejected as surplusage."

In the United States vs. Eisenminger, 16 Fed. (2nd) at page 820, the Court said:

> "The object of an alleged conspiracy is that which identifies and describes the particular unlawful agreement or conspiracy with which the defendant stands charged. No part of that description may be ignored as surplusage. It must be proved as laid." Quoting Rabens vs. U. S. 146 Fed. 978.

In the Eisenminger case, supra, the Court said:

> "If a legal act may be pleaded as part of the object of a conspiracy and the object of that conspiracy be affected by the committing of that legal act by anyone of the persons alleged to be parties to the conspiracy, then, indeed, has a prosecution for conspiracy become a most potent instrumentality for the conviction of the innocent. I think that the rules of pleading in conspiracy cases should not be further relaxed to the prejudice of those accused regardless of their guilt."

The evidence, taken as a whole, indicates, at its worst, that the defendant was endeavoring to ally himself with the cause of the Yaqui Indians, and to this end, was furnishing them ammunition as an inducement to take him along with them to Mexico. That he conspired with anyone is not in evidence. That there was ever a meeting of minds for the commission of an unlawful act was not shown. . . . . .

In Butler vs. U. S., 20 Fed. 570, the Court said:

> "The rule is that where words are employed in an indictment which are descriptive of the identity of that which is legally essential to the charge in the

indictment, such words cannot be stricken out as surplusage."

The indictment herein intended to charge a conspiracy to knowingly, willfully, unlawfully and feloniously, begin, set on foot and provide for a military enterprise to be carried on from the State of Arizona against Mexico; "that is to say, the said defendants did *(unlawfully?)* conspire to *(knowingly?)* set on foot and provide the means for an *(military?)* enterprise, having for its objects the inciting of armed rebellion in the Republic of Mexico, and the furnishing of arms, munitions, supplies and money for carrying on such rebellion, and an enterprise to be *carried on* from Tucson."

The Neutrality Statute cannot be violated by setting on foot or providing the means for an enterprise such as described in the indictment. Therefore, a conspiracy to do the things named would not be unlawful, and the defendant was entitled to a peremptory instruction to find him not guilty. The last above quoted language of the indictment negatives the main requirement of the law—that is, that it was to be attended by the design of an attack, invasion or conquest; there must be a hostile intention and it must be military, and intended "to go thence." (See U. S. vs. Ybañez, 53 Fed. 536).

To make our position clearer, may we state to the Court that the furnishing of money for carrying on and supporting a rebellion in a foreign country is not a violation of the Neutrality Statute even though such furnishing of money was to be carried on from Tucson, Arizona, and the furnishing of arms for such enterprise would not be a violation of the Statute in question even though the furnishing of arms was to be carried on from Tucson, Arizona.

Of course, the latter act would be in violation of the Presidential Proclamation placing an embargo on arms, etc., to Mexico, but the indictment did not charge this offense.

We respectfully submit that the Trial Court erred in the particulars herein set out and ask a reversal of the case.

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No. 5483

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

JOSE GANDARA,
Plaintiff in Error,

VS.

UNITED STATES OF AMERICA,
Defendant in Error.

ERROR FROM THE UNITED STATES DISTRICT COURT,
DISTRICT OF ARIZONA

DEFENDANT IN ERROR'S BRIEF

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IN THE
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JOSE GANDARA,
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Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR

The contentions of the plaintiff in error are

(1) To use his own words, as contained on page 4 of his brief:

> "that a party of insurgents or revolutionists came to the United States to procure arms and ammunition to take back with them to continue their revolutionary activities, and that the defendant's acts were exclusively with such enterprise."

(2) That the indictment, to use his own words on page 13 of his brief, is defective because it

> "negatives the main requirement of the law—that is, that it was to be attended by the design of an attack, invasion or conquest; there must be a hostile intention and it must be military, and intended '*to go thence*'."

No demurrer or other pleading was filed attacking the sufficiency of the indictment in the court below.

This waives all objections, except the objection that some substantial element of the crime was omitted.

Berry v. U. S. 259 F, 203. (C.C.A. Cal.)

The statute under which the indictment was found is as follows:

> "Whoever, within the territory or jurisdiction of the United States or any of its possessions, knowingly begins or sets on foot, or provides or prepares a means for or furnishes the money for, or who takes a part in, any military or naval expedition or enterprise to be carried *on from thence* against the territory or dominion of any foreign province or state, or of any colony, district or people with whom the United States is at peace, shall be punished etc."

Said Statute is 5286 of the Rev. Stats. It is set forth as Sec. 25, on page 44, Vol. 18 U. S. C. A. In

the said 18 U. S. C. A. are pages of annotations which should be read, as they bring all cases from the beginning to date.

The plaintiff in error, at the top of page 11 of his brief, says:

> "The indictment in this case follows the language of the statute but as it proceeds to describe, with attempted precision and certainty, the offense intended to be laid, it finally charges the defendant, as hereinabove stated, with a conspiracy, to set on foot and provide and prepare the means for an enterprise having for its object the inciting of armed rebellion, but not to go thence from the United States * * * * * "

We quote from the case of Jacobsen vs. U. S. (C. C. A. Ill. 1921), 272 Fed. 399, certiorari denied, (1921) 256 U. S. 703, 65 L. Ed. 1179, as follows:

> "An indictment is sufficient which charges the offense in substantially the language of the statute."

It is true that the indictment, after alleging that the enterprise was inaugurated near Tucson, Arizona, does not state that it was "to be carried on from thence," but it does state that it was,

> "An enterprise which was to be carried on from Tucson, Arizona."

If the offense was inaugurated at Tucson, Ari-

zona, and was to be carried on from Tucson, Arizona, it is merely a synomomous or perhaps slightly more definite method of saying that it was *inaugurated* at Tucson, Arizona, and was to be carried on from thence.

The distinction attempted to be drawn by the plaintiff in error, as aforesaid, seems to us as frivilous in the extreme.

We think it proper at this time to refer briefly to the evidence, most of which is not contradicted, and that which was contradicted was determined by the jury against the plaintiff in error and upon evidence which thoroughly warranted their said adverse findings.

The plaintiff in error testified that the rebellion of the Yaquis in Mexico had been in existence for years and was particularly hot at the time he came to Tucson, as there had just been a big battle in which General Armenta of the Mexican army was killed. A group of Yaquis had come to the vicinity of Tucson, Arizona, to obtain guns, ammunition and supplies so that they could return with them to the fight in Mexico. The Yaqui Indians in Mexico had a fighting force of between two and three thousand men.

Plaintiff in error was interested in the Yaquis' cause for two reasons, one sentimental, because his grandfather was the first to go in with the Yaquis seventy years ago to free their lands, and the other

reason was that his home in Chihuahua was ransacked by the Obregon soldiers, from the effect of which his mother had died.

Mr. Wren testified that plaintiff in error told him that he furnished the Yaquis with arms and ammunition, provisions and different things for making the trip into Mexico, and said that he was going to lead them.

Antonio Molino one of the Yaquis, testified that Bishop Navarette came to them with Gandara, and said:

> "Now, this Gandara, when he goes to fight, I want you to go with him to the opposite side."

When the Bishop and Gandara were there, Gandara did not talk to the Yaquis who had come from Sonora, but to Chito Valenzuela and other Yaquis, and he was fixing up everything with them. The rifles were to be used to get up a war and fight Mexico.

On cross-examination this witness testified that he had been "opposed to this movement that had been started to send Yaquis down in Mexico ever since this thing about Gandara started which was on San Juan's Day, the 24th day of June." When Gandara talked to this witness he always said that he wanted to go down with those Yaquis who were returning to Mexico.

Francisco Feliz, an Indian, testified that plaintiff in error came to see the Yaquis who had arrived from Mexico; that he was going to help them; that he was going down with them and take rifles, and that they were going down to fight the Mexican government.

After the Bishop left, Gandara told the Yaquis not to be afraid of him; that he was going along with them and to help the Yaquis.

Guadalupa Flores, an Indian who came up from Mexico, said they had been fighting in Mexico for five years. He came back to Tucson with about 22 others because their families were in Tucson and they went to work. Witness said he did not intend to return to Mexico, and did not know whether the others intended to return or not.

John J. Farrell testified that Gandara told him he got the arms, ammunition, canteens and food supplies and was going into Mexico with these Yaquis to fight the Mexican government because it had been mistreating everybody.

John Esteban Riveras, an Indian, testified that Gandara told the Indians he wanted to go back with them to Mexico. "All the men that he could gather around there were going with him, and they were all the Yaquis who had come up from Mexico, who had been fighting them before."

G. V. Hayes testified that Gandara told him that he was equiping the Yaquis for an expedition against Mexico, and that he himself was leading the expedition and that he had personally bought ammunition and provisions for the expedition.

Mr. Hayes further testified that Gandara told him that he was organizing the Yaquis into an expedition of which he was to be the head. He said "He was organizing all the Yaquis he could get hold of."

We will not go further into the testimony, as the foregoing was sufficient to sustain the jury's verdict.

The facts of the case, in brief, are therefore as follows:

The Yaqui Indians were and had been for years carrying on a rebellion against the Mexican government in Mexico.

A group of these Indians came to Tucson, Arizona, to obtain arms, ammunition and supplies with which, some at least, would return to Mexico to carry on the war.

The plaintiff in error attempted to get all the Yaquis possible and furnish them arms, ammunition and supplies and return with them into Mexico, as their leader, to fight the Mexican government.

Plaintiff in error is alleged to have conspired with others to effectually carry out the above plans.

Aside from some decisions concerning the necessary allegations in an indictment the plaintiff in error seems to rely upon one case, namely: U. S. vs. Trumbull, 48 Fed. 99, in support of his theory of the case.

We have given this Trumbull case careful consideration. The facts will be briefly referred to.

A body of men, in Chili, known as the "Congressional Party," were organized and engaged in a revolutionary attempt to overthrow the recognized government of Chili. This Congressional Party obtained a ship called the Italia which it converted into a man-of-war. This ship was dispatched to the United States for the purpose of obtaining arms and ammunition and returning with them to Chili. Prior to the arrival of the ship in the United States, an agent of the Congressional Party, by the name of Trumbull, *came* to the United States and purchased the arms and ammunition in open market, and had them put on board the Italia.

The Court held that the statute in question did not cover such a situation, saying:

> "The very terms of the statue imply that the military expeditions or enterprises thereby prohibited are such as originate within the limits of the United States, and are to be carried on from this country. ' Every person who, within the limits or jurisdiction of the United States, begins or sets on foot, or provides or prepares

the means for, any military expedition or enterprise, to be carried on from thence'—that is to say, from the United States—is the language of the statue. If the evidence shows that in this case there ever was any military expedition begun or set on foot, or provided or prepared for, within the sense of this statue, it was begun, set on foot, provided and prepared for in Chili, and was to be carried on from Chili, and not from the United States. But I think it perfectly clear that the sending of a ship from Chili to the United States, to take on board arms and ammunition purchased in this country, and carry them back to Chili, is not the beginning, setting on foot, providing or preparing the means for any military expedition or enterprise within the meaning of section 5286 of the Revised Statutes. The cases of the Mary A. Hogan, 18 Fed. Rep. 529; U. S. v. Two Hundred and Fourteen Boxes of Arms, etc., 20 Fed. Rep. 50; and U. S. v. Rand, 17, Fed. Rep. 142,—cited by counsel for the United States in support of their position in respect to this point,—do not at all support it. In each of those cases there was a military expedition, and it was organized within, started from, and was to be carried on from the United States. The facts of those cases are wholly different from the facts of the present case."

It will be noted that the Congressional Party had organized a revolution in Chili. It sent a boat from Chili to the United States for arms and ammunitions; it sent its agent, Trumbell, to the United States to purchase arms and ammunition; the said agent purchased the arms and ammunition in the open markets in New York, and placed them on board

of the boat, to be transported back to Chili. Those were the facts which the Court applied to the law in question, and held that they were not violative of such law, because, they did not show a beginning, setting on foot, providing or preparing the means for any military expedition or enterprise to be carried on from the United States. On the contrary, said facts prove that the military enterprise was begun in Chili, and was to be carried on from Chili.

Let us now refer to the facts in the case at bar and their very difference will demonstrate the guilt, under the statue, of the defendant herein.

A Yaqui Indian revolution was in progress in Mexico. After a big battle, a band of the Indians came to the United States, some of the band intending to remain in the United States, and others of the band intending to obtain arms, ammunition and supplies and return to the fighting in Mexico. Upon their arrival in the United States, the plaintiff in error, Gandara, hunted them up, forced his way into their confidence, purchased and donated to them arms, ammunition and supplies, exhorted these Indians, and *other indians* who were residing in the United States, to band themselves together and return to Mexico to fight the Mexican Government, and he, the said Gandara, was himself to return to Mexico with such Indians, and as their leader.

Gandara was not an agent of the Yaquis, sent

by them into the United States to purchase for them in the open markets arms and ammunition, and this band of Yaquis did not come to the United States to receive such arms and ammunition from their said agent and return with them to Mexico.

Gandara was and had been living in the United States, at El Paso, Texas, for many years. He hunted up these Indians; he purchased for and gave them, without compensation, arms and ammunition; he exhorted them, and other indians, to return to Mexico and fight; and he himself was to accompany them on their return into Mexico, and to act as their leader and engage himself in the revolution.

We submit that Gandara did, therefore, set on foot, provide and prepare the means, if not in whole then in a material part, for a military enterprise to be carried on in Mexico from the United States.

The trial Court in his charge to the jury, and after quoting the statute under which the indictment was brought, said:

> "You will observe, Gentlemen, that the enumerated acts which constitute the offense under this Section 13, are all in the disjunctive. To begin the military expedition spoken of is an offense within the statute. To begin it is to do the first act which may lead to the enterprise. The offense is consummated by any overt act which shall be a commencement of the expedition, though it should not be prosecuted. Or,

if an individual shall 'set the expedition on foot,' which is scarcely distinguishable from beginning it. To set it on foot may imply some progress beyond that of beginning it. Any combination of individuals to carry on the expedition is 'setting it on foot' and the contribution of money or anything else which shall induce such combination may be a beginning of the enterprise.

"To provide the means for such an enterprise is within the statute. To constitute this offense, the individual need not engage personally in the expedition. If he furnish the munitions of war, provisions, transportation, clothing, or any other necessaries to men engaged in the expedition, he is guilty, for he provides the means to carry on the expedition.

"It must be a nation or people with whom we are at peace. 'In passing the above law, Congress has performed a high national duty'—and in quoting this I am reading from a charge of one of the Judges of the Supreme Court. 'A nation, by the laws of nations, is considered a moral being, and the principle which imposes moral restraints on the conduct of an individual applies with greater force to the actions of a nation.'

"'Justice,' says Vattel, who, by the way, was one of the great authorities on International Law and wrote a celebrated work on International Law, 'is the basis of society, the sure bond of all commerce. Human society, far from being an intercourse of assistance and good offices, would be no longer anything but a vast scene of robbery, if there were no respect to this virtue, which secures to every one his own.'

"It is still more necessary between nations than between individuals, because injustice produces more dreadful consequences in the quarrels of these powerful bodies politic, and it is still more difficult to obtain redress.

"Before a jury can convict, it must be proved to their satisfaction that the expedition or enterprise was in its character military; or, in other words, it must have been shown by competent proof that the design, the end, the aim, and the purpose of the expedition, or enterprise, was some military service, some attack or invasion of another people or country, state or colony as a military force.

"This statute does not require any particular number of men to band together to constitute the expedition or enterprise one of military character. There may be divisions, brigades and regiments ,or there may be companies or spuads of men. Mere numbers do not conclusively fix and stamp the character of the expedition as military or otherwise. A few men may be deluded with the belief of their ability to overturn an existing government or empire, and laboring under such delusion, they may enter upon the enterprise. * * * * Evidence showing that the end and objects were hostile to or forcible against a nation at peace with the United States characterizes it, to all intents and purposes, as a military expedition or enterprise.

"The words 'military enterprise,' while including a military expedition, have been held by the Supreme Court to give a wider scope to the statute than the latter term, and that a military enterprise may consequently include various undertakings by single individuals, as well as by a number of persons. It has been held that

this Section does not require that the expedition should have actually set out or any particular number of men, the crime being completed by the organization only. The words, 'to be carried on from thence' are employed in the sense of carrying out, or forward, 'from thence.'

"Reading again from a case considering this statute, 'The statute defines the offense disjunctively as committed by every person who, within the territory or jurisdiction of the United States, knowingly begins, or sets on foot or provides or prepares a mean for, or furnishes the money for, or who takes part in, any military or naval expedition or enterprise to be carried on from thence, against the territory or dominion of any foreign state, district or people with whom the United States is at peace.'

"Begin is to do the first act, to enter upon; to begin an enterprise is to take the first step; the initiatory movement of an enterprise, the very formation and commencement of an expedition. To 'set on foot' is to arrange, to place in order, to set forward, to put in way of being ready. To provide is to furnish and supply; and 'to procure means' is to obtain, bring together, put on board, to collect.

"The beginning, the setting on foot, or the providing or procuring materials for such an expedition or enterprise must be within the territory or jurisdiction of the United States, and to be carried on from thence, against the territory or dominions of some foreign state, colony, district, or people, with whom the United States were at peace.

"A single individual may begin or set on foot a military expedition or enterprise, and a

single individual may provide or prepare the means for such an expedition or enterprise."

We believe the law is as follows:

The statute must be reasonably construed in such a way as not to defeat the obvious intention of the Legislature. Wiborg v. U. S. (Pa. 1896) 163 U. S. 632, 16 S. Ct. 1127, 1197, 41 L. Ed. 289. It is to be construed as other domestic legislation is, and its meaning is to be found in the ordinary meaning of the terms used. Wiborg v. U. S. (Pa. 1896) 163 U. S. 632, 16 S. Ct. 1127, 1197, 41 L. Ed. 289.

The statute defines the offense disjunctively as committed by every person who, within the territory or jurisdiction of the United States, "begins, or sets on foot, or provides or prepares the means for, any military expedition or enterprise to be carried on from thence." Wiborg v. U. S. (Pa. 1896) 163 U. S. 632, 16 S. Ct. 1127, 1197, 41 L. Ed. 289.

It has been held that this section creates two offenses: (1) setting on foot, within the United States a military expedition, to be carried on against any power, etc., with whom the United States are at peace; (2) providing the means for such expedition. U. S. v. Hart (D. C. Pa. 1897) 78 F. 868, affirmed Hart v. U. S. (1898) 84 F. 799, 28 C. C. A. 612.

But in another case it was said that "there are four acts which are declared to be unlawul, and

which are prohibited by the statute: to 'begin' an expedition; to 'set on foot' an expedition; to 'provide' the means for an enterprise; and lastly to 'procure' those means." U. S. v. O'Sullivan (D. C. N. Y. 1851) 27 Fed. Cas. No. 15,975.

"Begin" is to do the first act; to enter upon. To begin an enterprise is to take the first step; the initiatory movement of an enterprise, the very formation and commencement of an expedition. "To set on foot" is to arrange, to place in order, to set forward, to put in way of being ready. "To provide" is to furnish and supply; and "to procure the means" is to obtain, bring together, put on board, to collect. The beginning, the setting on foot, or the providing or procuring materials for such an expedition or enterprise, must be within the territory or jurisdiction of the United States, and to be carried on from thence, against the territory or dominions of some foreign prince or state, colony or district or people, with whom the United States were at peace. U. S. v. O'Sullivan (D. C. N. Y. 1851) 27 Fed. Cas. No. 15,975. See, also U. S. v. Ybanez (C. C. Tex. 1892) 53 F. 536, where the court further said, charging a jury: "There are certain acts which are declared to be unlawful, and which are prohibited by the statute, to wit, to begin an expedition; to 'set on foot' an enterprise,—the expedition or enterprise, in either case, having reference to one of a military character."

It is not necessary, to warrant a conviction, that there shall at any time be in existence a military expedition or enterprise. It is sufficient if a military enterprise was a part of the intent and purpose of those engaged in the doing of the things prohibited by the statute. Any offense under the statute may be committed by an individual. Jacobson v. U. S. (C. C. A. Ill. 1921) 272 F. 399, certiorari denied Jacobson v. U. S. (1921) 41 S. Ct. 625, 256 U. S. 703, 65 L. Ed. 1179.

To sustain an indictment under this section, charging that defendants did "begin, set on foot, provide, or prepare the means for" a military expedition against a friendly power, it is not necessary that the acts of defendants should have progressed so far as the complete organization and sending of such expedition, or that it was to be wholly carried on from the United States, but it is sufficient if the plan was made and was to be directed from here, and that funds were collected in this country for carrying it out. Jacobsen v. U. S. (C. C. A. Ill. 1921) 272 F. 399, certiorari denied Jacobson v. U. S. (1921) 41 S. Ct. 625, 256 U. S. 703, 65 L. Ed. 1179.

Meaning of "expedition" or "enterprise"—"The term 'expedition' is used to signify a march or voyage with martial or hostile intentions. The term 'enterprise' means an undertaking of hazard, an arduous attempt." U. S. v. O'Sullivan (D. C. N. Y.

1851) 21 Fed. Cas. No. 15,975; U. S. v. Ybanez (C. C. Tex. 1892) 53 F. 538.

The word "enterprise" is somewhat breader than the word "expedition"; and although the words are synonymously used, it would seem that under the rule that its every word should be presumed to have some force and effect, the word "enterprise" was employed to give a slightly wider scope to the statute. Wilborg v. U. S. (Pa. 1896) 163 U. S. 632, 16 S. Ct. 1127, 1197, 41 L. Ed. 289. See, also, U. S. v. Murphy (D. C. Del. 1898) 84 F. 609.

The language of the statute is very comprehensive and peremptory. It brands as a national offense the first effort or proposal by individuals to get up a military enterprise within this country against a friendly one. It does not wait for the project to be consummated by any formal array, or organization of forces, or declaration of war; but strikes at the inception of the purpose, in the first incipient step taken, with a view to the enterprise, by either engaging men, munitions of war, or means of transportation, or funds for its maintenance; and even further, it is not necessary that the means shall be actually provided and procured. The statute makes it a crime to procure those means. This would clearly comprehend the making ready, and the tender or offer of such means to encourage or induce the expedition; and may probably include also any plan

or arrangements, having in view the aid and furtherance of the enterprise. U. S. v. O'Sullivan (D. C. N. Y. 1851) 27 Fed. Cas. No. 15,975.

Probably a previously concerted movement or arrangement, with a distinct reference to the recruitment of men, would be sufficient to constitute such a beginning. And if this was followed up by the designation of a plan for an enlistment or enrollment, though there should be no proof that any were actually enlisted or enrolled, it would bring the parties implicated within the operation of the section referred to. U. S. v. Lumsden (C. C. Ohio, 1856) 1 Bond 5, 26 Fed. Cas. No. 15,641.

An expedition is begun or set on foot within the meaning of the statute where one takes part in collecting a body of men and in collecting arms and equipment with the intent that the two shall be combined afterwards so as to form a complete expedition. U. S. v. Nunez (C. C. N. Y. 1896) 82 F. 599.

The actual enlistment or enrollment of men, with the purpose of engaging in an unlawful military expedition or enterprise, is clearly within the statute. U. S. v. Lumsden (C. C. Ohio, 1856) 1 Bond 5, 26 Fed. Cas. No. 15,641.

A single individual may violate this section by setting on foot a military expedition. U. S. v. Ram Chandra (D. C. Cal. 1917) 254 F. 635; U. S. v. Burr (D. C. Va. 1807) 25 Fed. Cas. No. 14,694.

To "provide or prepare the means for any military expedition or enterprise," within the meaning of this section such preparation must be made as shall aid the expedition. The contribution of money, clothing for the troops, provisions, arms, or any other contribution which shall tend to forward the expedition or add to the comfort or maintenance of those engaged in it, is a violation of this provision. Charge to Grand Jury (C. C. Ohio, 1838) Fed. Cas. No. 18,265; Charge to Grand Jury (C. C. Ohio, 1851) Fed. Cas. No. 18,267; Charge to Grand Jury (C. C. La. 1859) Fed. Cas. No. 18,268.

To provide the means for the expedition, as the enlistment of men, the munitions of war, money, in short, anything and everything that is necessary to the commencement and prosecution of the enterprise, is within the statute. Charge to Grand Jury (C. C. Ind. 1851) 5 McLean 249, 30 Fed. Cas. No. 18,266.

Any contribution which tends to form, or assistance given to those engaged in a military expedition or enterprise of the character prohibited by the statute must be considered within its purview. U. S. v. Hughes (D. C. S. C. 1895) 70 F. 972.

The words "military enterprise," while including a military expedition, has a wider scope than the latter term.

A military expedition is a journey or voyage by

a company or body of persons having the position or character of soldiers, for a specific warlike purpose; also the body and its outfit; and a military enterprise is a martial undertaking, involving the idea of a bold, arduous, and hazardous attempt. Wiborg v. U. S. (Pa. 1896) 163 U. S. 632, 16 S. Ct. 1127, 1197, 41 L. Ed. 289, modifying U. S. v. Wiborg (D. C. Pa. 1896) 73 F. 159.

A military expedition comprehends any combination of men, organized in this country, however imperfectly, and provided with arms and ammunition, to go to a foreign country, and make war on its government. U. S. v. Hart (D. C. Pa. 1897) 78 F. 868, affirmed Hart v. U. S. (1898) 84 F. 799, 28 C. C. A. 612.

It is immaterial whether the expedition intends to make war as an independent body, or in connection with others. Wiborg v. U. S. (Pa. 1896) 163 U. S. 632, 16 S. Ct. 1127, 1197, 41 L. Ed. 289, modifying U. S. v. Wiborg (D. C. 1896) 73 F. 159; U. S. v. Hart (D. C. Pa. 1897) 78 F. 868, affirmed Hart v. U. S. 1898) 84 F. 799, 28 C. C. A. 612.

A military expedition or a military enterprise may consist of few or many men. The existence or character of the military expedition or the military enterprise does not require concerted action on the part of a large number of individuals. U. S. v. Murphy (D. C. Del. 1898) 84 F. 609; U. S. v. Ybanez

(C. C. Tex. 1892) 53 F. 536; U. S. v. Chakraberty (D. C. N. Y. 1917) 244 F. 287.

A hostile expedition dispatched from the ports of the United States is within the words "carried on from thence." Wiborg v. U. S. (Pa. 1896) 163 U. S. 632, 16 S. Ct. 1127, 1197, 41 L. Ed. 289.

The carrying on from the United States of an expedition against a neutral power is an offense, though the association originated in another country. Ex parte Needham (C. C. Pa. 1817) Fed. Cas. No. 10,080.

Where arms, military stores, and means for the transportation of them, and of the men subsequently taken on board, were here provided and started out, it was held that a military enterprise was begun or set on foot within the territory of the United States to be carried on from thence though the men were not taken on board until the vessel reached a foreign port. U. S. v. Rand (D. C. Pa. 1883) 17 F. 142.

Neither prior recognition of legitimacy nor belligerency of the government or faction against which the expedition is directed, by this government, is necessary to make applicable the provisions of this section. De Orozco v. U. S. (Tex. 1916) 237 F. 1008, 151 C. C. A. 70, citing The Three Friends (Fla. 1897) 17 S. Ct. 495, 166 U. S. 1, 41 L. Ed. 897, and holding that it would be an offense under this section to prepare a military expedition to be carried on

against the Carranza government in Mexico, though his government had not been recognized as the legitimate government of Mexico.

While the statute was, as a general purpose, enacted to secure neutrality in wars between two other nations or between contending parties recognized as belligerents, its operation is not necessarily dependent on the exercise of belligerency. Wiborg v. U. S. (Pa. 1896) 163 U. S. 632, 16 S. Ct. 1127, 1197, 41 L. Ed. 289.

To constitute the offense, it is not necessary that the expedition should start for its destination. U. S. v. Ybanez (C. C. Tex. 1892) 53 F. 536; U. S. v. O'Sullivan (D. C. N. Y. 1851) Fed. Cas. No. 15, 975; U. S. v. Chakraberty (D. C. N. Y. 1917) 244 F. 287.

Where the question was raised that there should have been no conviction because the evidence did not show that all that was done by the defendants did constitute a military enterprise, the court said: "Whether what the defendants did actually reached the dignity of a military expedition or enterprise is not deemed material, if the evidence shows that, under the conspiracy charge, the conception, the thing they intended, amounted to a military expedition or enterprise, and if under the other charge the defendants did in the way charged any one or more of the things charged." Jacobsen v. U. S. (C. C. A. Ill.

1921) 272 F. 399, certiorari denied (1921) 41 S. Ct. 625, 256 U. S. 703, 65 L. Ed. 1179.

The government earnestly contends that the defendant in this action was properly convicted and his rights in every way protected and it submits the matter to this Honorable Court in utmost confidence that the government's contention will be sustained.

Respectfully submitted,

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United States Attorney.

CLARENCE V. PERRIN,
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For Defendant in Error.

No. 5483

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JOSE GANDARA,
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

PETITION FOR REHEARING ON BEHALF OF PLAINTIFF IN ERROR.

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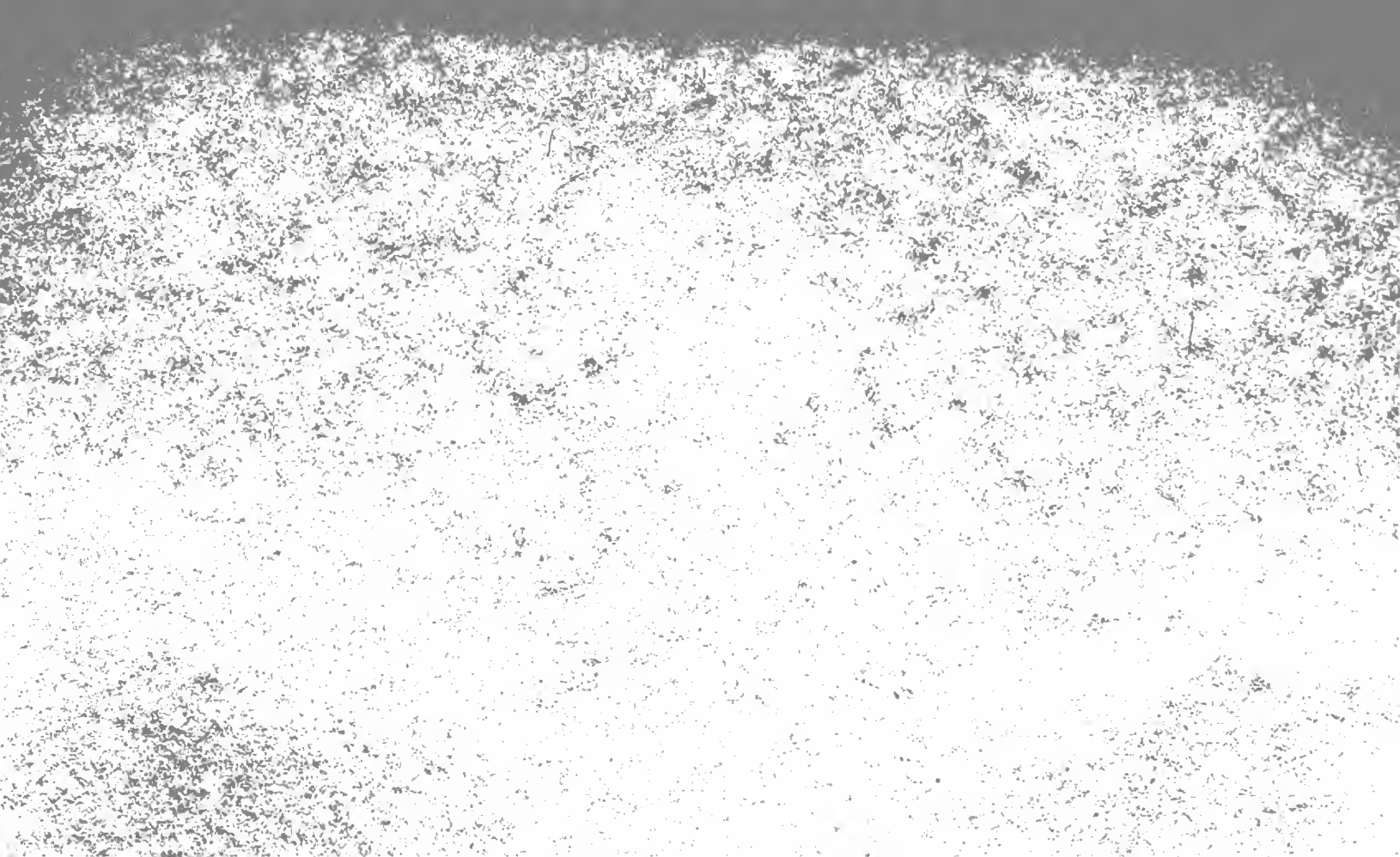

No. 5483

IN THE

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JOSE GANDARA,
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

PETITION FOR REHEARING ON BEHALF OF PLAINTIFF IN ERROR.

To the Honorable Frank H. Rudkin, Frank S. Dietrich and Curtis D. Wilbur, Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Plaintiff in error respectfully but very earnestly asks for a rehearing of this cause. He firmly believes that upon further consideration this court will direct a reversal of the judgment below.

Before discussing the action of the trial court in refusing to give the instruction proposed by plaintiff in error embodying his theory of the case or in giving instructions which in substance advised the jury that plaintiff in error was guilty as charged if he merely furnished arms and ammunition to the group of

twenty-three Yaqui Indians, who had been engaged in the insurrection in Mexico and who came to Tucson for the purpose of obtaining arms and ammunition (Tr. p. 77), and then returning to Mexico to rejoin the insurrectionists, plaintiff in error desires to call the court's attention to certain matters shown by the record which in his humble opinion entitle him to a reversal.

I.

UNDER THE INDICTMENT, PROPERLY CONSTRUED, THE ONLY ALLEGED CONSPIRATORS WERE PLAINTIFF IN ERROR, BISHOP NAVARETTE, AND DEFENDANTS BORGARO AND VALENZUELA. BISHOP NAVARETTE WAS ACQUITTED, A NOLLE PROSEQUI WAS ENTERED AS TO BORGARO AND VALENZUELA, AND PLAINTIFF IN ERROR ALONE WAS CONVICTED. INDIVIDUALLY, HE COULD NOT HAVE COMMITTED THE CRIME OF CONSPIRACY.

Plaintiff in error was charged with engaging in a conspiracy with Bishop Navarette, Esteban Borgaro, Jr., and Antonio Valenzuela, his co-defendants, to violate Section 13 of the Federal Penal Code. For the purpose of specifying the exact charge against the defendants, the indictment alleged:

> "that is to say, at the time and place aforesaid, the said **defendants** did conspire to set on foot and provide and prepare the means for an enterprise having for its objects the inciting of armed rebellion in the Republic of Mexico of the citizens of said Republic of Mexico against the government and authority there, and the furnishing of arms, munitions, supplies and money for carrying on and supporting such rebellion, and an enterprise which was to be carried on from Tucson, Arizona, aforesaid, **by the said defend-**

> **ants,** devising the plan of the same there." (Tr. p. 3.)

We would ask the court to mark well that the indictment, properly construed, charges that the *defendants* conspired to set on foot and provide and prepare the means for the alleged unlawful enterprise and that the said enterprise was to be carried on from Tucson, Arizona, by the *defendants* who devised the plan of the same there.

The defendants named in the indictment were plaintiff in error, Bishop Navarette, Esteban Borgaro, Jr. and Antonio Valenzuela. The trial proceeded only as to Bishop Navarette, Esteban Borgaro, Jr. and Plaintiff in error. Bishop Navarette, whose name was linked with plaintiff in error throughout the trial, was liberated upon a directed verdict for the reason that the court found that the evidence was insufficient to establish his guilt. (Tr. p. 15.) The jury disagreed as to the defendant Borgaro. (Tr. p. 20.) Subsequently, upon motion of the District Attorney, the cause was dismissed as to the defendants Borgaro and Valenzuela. (Tr. p. 26.) It follows, therefore, that of all the defendants named in the indictment as conspirators, plaintiff in error alone was convicted, his co-defendant, Bishop Navarette being acquitted at the court's direction and a *nolle prosequi* being entered as to defendants Borgaro and Valenzuela.

Plaintiff in error contends that under the circumstances, the cause should be reversed as to him. The charge upon which plaintiff in error was brought to

trial was not the violation of Section 13 of the Federal Penal Code. The specific charge was that he and his co-defendants *conspired* to set on foot and provide and prepare the means for a military enterprise having for its objects the inciting of armed rebellion in the Republic of Mexico and the furnishing of arms, munitions, etc., for carrying on and supporting such rebellion *and an enterprise which was to be carried on from Tucson, Arizona, aforesaid, by the said defendants who devised the plan of the same there.* (Tr. p. 3.)

The union of minds of at least two persons is a prerequisite to the commission of the crime of conspiracy.

Feder v. United States, 257 Fed. 694, 5 A. L. R. 370;

State v. Jackson, 7 S. C. 283, 24 Am. Rep. 476.

If all of the conspirators, excepting one, are either acquitted or released upon a nolle prosequi, the basis of the charge is removed and the remaining defendant cannot properly be convicted.

Feder v. United States, supra;

State v. Jackson, supra;

Wharton's Criminal Law (11th Ed.) Sec. 1675.

It may be contended by the District Attorney that the indictment not only charged that the plaintiff in error and his co-defendants, Borgaro, Valenzuela and Bishop Navarette conspired together, but that they also conspired with divers other unknown persons to commit the offense against the neutrality statute. It is true that in the opening part of the indictment the

defendants were charged with conspiring "together and with divers other persons whose names are to the grand jurors unknown" to commit the offense of knowingly, wilfully, unlawfully and feloniously beginning, setting on foot and providing and preparing the means *for a certain military enterprise* to be carried on from the State of Arizona against the Republic of Mexico. In that part of the indictment, the charge was made practically in the wording of the statute, without any attempt to specify what the alleged military enterprise was or in what it consisted. The defendants were, of course, entitled to be informed as to exactly what they conspired to do and as to the nature of the alleged military enterprise. To give that very information to the defendants, the indictment specified the charge as follows:

> "*that is to say,* **THE SAID DEFENDANTS** *did conspire to set on foot and provide and prepare the means for an enterprise having for its objects the inciting of armed rebellion in the Republic of Mexico of the citizens of said Republic of Mexico against the government and authority there and the furnishing of arms, munitions, supplies and money for carrying on and supporting such rebellion in an enterprise which was to be carried on from Tucson, Arizona, aforesaid,* **BY SAID DEFENDANTS**, *devising the plan of the same there.*"

Manifestly, the indictment, taken and considered as a whole, charged that the defendants, and the defendants alone, entered into the conspiracy and charged that the unlawful enterprise for the purpose of inciting armed rebellion in the Republic of Mexico was to be carried on by the defendants and the de-

fendants alone. Under the circumstances, the reference in the first part of the indictment to "divers other persons" whose names were unknown should be entirely ignored.

The specific military enterprise referred to in the indictment was one having for its objects the inciting of armed rebellion in the Republic of Mexico and the furnishing of arms, munitions, supplies and money for carrying on and supporting such rebellion—and the only ones charged with conspiring to commit that crime were the defendants named in the indictment. It was necessary for the indictment to go still further and show that the military enterprise was "to be carried on from" the United States. Accordingly, the indictment charged that the unlawful enterprise, having for its object the inciting of armed rebellion in Mexico "*was to be carried on from Tucson, Arizona, aforesaid,* BY THE SAID DEFENDANTS", who devised the plan of the enterprise there. It is quite evident that no one other than the defendants Gandara, Borgaro, Valenzuela and Bishop Navarette, were charged with carrying the enterprise forward from the United States.

It is respectfully submitted, therefore, that under the terms of the indictment the only co-conspirators of the plaintiff in error were defendants, Borgaro, Valenzuela and Bishop Navarette. Bishop Navarette stands acquitted. The charge against Messrs. Borgaro and Valenzuela was dismissed on motion of the District Attorney. We repeat, therefore, that the very basis of the charge has been removed and as this

fact is disclosed by the record before this court (Tr. p. 26) the judgment against plaintiff in error should be reversed.

Even though the indictment were properly open to the construction that not only the named defendants, but also certain unknown and unnamed persons were the alleged conspirators, there is absolutely no evidence in the record showing or tending to show that there was any conspiracy between the plaintiff in error and any unknown or unnamed person or persons. If there were any unknown and unnamed conspirators, they must be found among the Yaqui Indians—and the record will be searched in vain for evidence establishing that there was any conspiracy between the plaintiff in error and any Yaqui Indian.

While there was some evidence to the effect that plaintiff in error and Bishop Navarette visited some of the Yaquis and spoke of obtaining ammunition and supplies for them, there was no evidence that those Yaquis did anything other than listen to the conversation—there was no evidence that the Yaquis, or any of them, agreed to receive or accept the ammunition or supplies, or that they entered into any agreement or arrangement of any kind with plaintiff in error, or any of the other defendants. And if the record shows that any ammunition or supplies were later furnished by plaintiff in error, there is not a scintilla of evidence showing or tending to show to whom the ammunition and supplies were furnished, or that the Yaquis, if any, who received the ammunition and supplies were those whom plaintiff in error and

Bishop Navarette visited and conversed with—and there was no evidence at all that the Yaquis, if any, who were furnished with the ammunition and supplies had any agreement or arrangement or understanding of any kind with plaintiff in error or Bishop Navarette.

The evidence was entirely insufficient to establish that any Yaqui Indian set on foot or provided or prepared a means for or took part in any military expedition or enterprise against the Mexican government to be carried on from the United States. But even if the evidence abundantly established that one or more Yaquis had thus violated Section 13 of the Federal Penal Code, that fact would be entirely immaterial as that was not the charge laid in the indictment. The Yaquis may well have been guilty of violating the neutrality statute without being guilty of the crime of conspiracy. Indeed, the Yaquis may have been guilty of conspiring among themselves to violate said statute without being guilty of the crime of conspiring with plaintiff in error to violate it. We emphatically repeat that there was no evidence that any Yaqui Indian was a co-conspirator of plaintiff in error—and there was no evidence that any unknown or unnamed person was a co-conspirator of plaintiff in error. Under the evidence the only possible co-conspirators of plaintiff in error were his three co-defendants. And, as we have stated, one of them was acquitted and the District Attorney entered a *nolle prosequi* as to the other two—thus leaving plaintiff in error to have conspired only with himself.

II.

THE TRIAL COURT ERRED WHEN IT INSTRUCTED THE JURY THAT PLAINTIFF IN ERROR COULD BE FOUND GUILTY EVEN THOUGH HE DID NOT CONSPIRE WITH THE NAMED DEFENDANTS, PROVIDED THAT HE DID CONSPIRE WITH ONE OR MORE OF THE YAQUI INDIANS.

In view of the indictment which charged that *the defendants conspired* to set on foot and provide and prepare the means for a military enterprise, which had as its object the inciting of armed rebellion in the Republic of Mexico, and further charged that it was a military enterprise which was *to be carried on from the United States by the defendants, who devised the plan of the same there,* it was clearly error for the trial court to charge the jury that if plaintiff in error conspired with one or more of the Yaqui Indians and with no one else, he may be found guilty of the charge of conspiracy. The court gave that very instruction when it instructed the jury as follows:

> "You will observe, Gentlemen, that the indictment alleges that the conspiracy was formed among Jose Gandara, Esteban Borgaro, Junior, Antonio Valenzuela, alias Chito Valenzuela, and Bishop Navarette and the charge is that they did combine and confederate together to violate the laws of the United States, and with divers other persons, whose names are to the Grand Jurors unknown, so that in order to convict, in the event that you do not find both of these defendants guilty of the conspiracy you might find one of them guilty—*in other words, if these two men did not conspire, as charged in the indictment, between themselves, but you believe that one of them did conspire with one of the other persons named in the indictment, or with those whose names are to the Grand Jurors unknown,—for*

> *instance, one or more of the Yaqui Indians—then, one of the defendants may be found guilty, the one so conspiring, and the other acquitted.*" (Tr. p. 221.)

If the jury believed that the defendants, or two or more of them, did not conspire to set on foot and provide and prepare the means for an enterprise, having for its objects the inciting of armed rebellion in the Republic of Mexico, and the furnishing of arms, munitions, supplies and money for carrying on and supporting such rebellion, then plaintiff in error should have been acquitted, for that was the very conspiracy with which he and his co-defendants were charged in the indictment. And as the indictment charged that the enterprise was one "to be carried on from Tucson, Arizona, aforesaid, by the said defendants, devising the plan of the same there," the defendants were entitled to an acquittal, unless the evidence warranted a finding that the enterprise was to be carried on from that place. The indictment did not charge that the Yaqui Indians, or in fact anyone other than the named defendants, conspired to set on foot and provide and prepare the means for the military enterprise, which had as its object the inciting of armed rebellion in the Republic of Mexico; and the indictment did not charge that the Yaqui Indians were to take any part in carrying on the alleged unlawful enterprise from Tucson, Arizona, or that the Yaqui Indians participated in devising the plan of said enterprise. Therefore, the jury should not have been instructed that the plaintiff in error

could be held upon the charge of conspiracy if he conspired with one or more of the Yaqui Indians and with no one else. In fact, the jury should have been instructed that under the terms of the indictment a verdict of guilty as to plaintiff in error could not be returned, unless the evidence disclosed that plaintiff in error conspired with one or more of his co-defendants to set on foot and provide and prepare the means for the military enterprise, having for its object the inciting of armed rebellion in Mexico.

It may be urged by the government that plaintiff in error took no exception to that part of the charge wherein the court instructed the jury that plaintiff in error could be found guilty, even though he did not conspire with any of the named defendants, provided that he did conspire with one or more of the Yaqui Indians, or with any other unnamed person—and that, therefore, plaintiff in error has waived the right to predicate error upon that part of the charge. If plaintiff in error is correct in his contention that he was entitled to an acquittal, unless the evidence justified a finding that he had entered into a conspiracy with one or more of the named defendants, and that it was not sufficient for the government to merely prove that he conspired with one or more of the Yaqui Indians, then there was radical fault in the action of the trial court in giving the instruction complained of, and plaintiff is entitled to have that fault reviewed and corrected, even though there was no

objection or exception taken to that specified part of the charge.

Skuy v. United States, 261 Fed. 316;
Wiborg v. United States, 163 U. S. 632, 659; 41 L. Ed. 289;
August v. United States, 257 Fed. 388;
Brasfield v. United States, 272 U. S. 448, 71 L. Ed. 345;
New York C. R. Co. v. Johnson, 73 L. Ed. 315.

III.

THE THEORY OF THE DEFENSE WAS NOT ONLY IGNORED BY THE TRIAL COURT, BUT IT WAS ENTIRELY REPUDIATED BY INSTRUCTIONS DIRECTLY OPPOSED TO IT.

Plaintiff in error had a well-defined theory of defense, which he endeavored to embody in the instruction which the court refused to give. That theory was that a rebellion of the Yaqui Indians against the Republic of Mexico was in existence therein prior to the commission of any of the acts charged in the indictment, and if members of the armed forces of the Yaqui Indians came to the United States for the purpose of securing arms and ammunitions and then returning to rejoin the forces of the Yaqui Indians in Mexico, and if the plaintiff in error furnished arms and ammunition only for such Indians as had come from Mexico and intended to return to Mexico, and did not do anything more, his conduct did not constitute a violation of the neutrality statute, and he could not be properly convicted of a conspiracy to

violate said statute. The trial court entirely ignored that theory of the defense. It not only ignored that theory when it refused the requested instruction, but it acted in direct opposition to that theory throughout its instructions to the jury. This fact is recognized in the opinion filed by his Honor, Judge Wilbur.

There was one group of twenty-three Yaquis who left the insurrectionists in Mexico and went to Tucson, Arizona, to get rifles and ammunition. (Tr. p. 77.) It was plaintiff in error's contention throughout the trial that those Yaquis, in thus coming to the United States for that purpose and in obtaining the rifles and ammunition while here and in taking the same to Mexico for the purpose of rejoining the rebellion, were not guilty of a violation of our neutrality statute and could not be properly convicted of a conspiracy to violate that statute. And plaintiff further contended that if he gave or sold ammunition and supplies to that group of Yaquis and did nothing more, he was not guilty of the charge set forth in the indictment. Judge Wilbur, in his opinion, holds that if those twenty-three Yaquis obtained arms and ammunition at Tucson and returned therewith to Mexico, under the circumstances above stated, they were guilty of setting on foot a military expedition or enterprise to be carried on from Arizona against the Mexican government in violation of Section 13 of the Federal Penal Code. Judge Wilbur further holds that if plaintiff in error knowingly sold or gave arms and ammunition to that group of Yaquis and did absolutely nothing else, he could be found guilty of a violation of that statute. We respectfully take issue

with Judge Wilbur on that statement of the law involving as it does a construction of our neutrality statute. *Trumbull v. United States,* 48 Fed. 99 is direct authority to the effect that that military expedition, if such it may be called, was one begun, set on foot, provided and prepared for in Mexico and was to be carried on from Mexico and not from the United States.

We have referred to a group of twenty-three Yaquis because the evidence refers to such a group. (Tr. p. 77.) It is to be concluded from Judge Wilbur's opinion that if even two Yaquis left the insurrectionists in Mexico to obtain arms and ammunition, and went to Arizona for that purpose and immediately obtained the same and returned therewith to Mexico, they were guilty of putting on foot, etc., a military expedition against the Mexican government; and it is to be further concluded from Judge Wilbur's opinion that if plaintiff in error gave those two Yaquis arms and ammunition, and did nothing else, he too was guilty of violating the neutrality statute. Surely, such is not and cannot be the law. The opinion of Judge Dietrich, concurred in by Judge Rudkin, would indicate that they do not believe that the mere furnishing of arms and ammunition to any group of said Yaquis, however large or small the group may be, without any further word or action upon the part of the one so furnishing them, would amount to a violation of Section 13 of the Federal Penal Code.

Now, in the requested instruction, plaintiff in error endeavored to enunciate his theory and contention,

to wit: that if the Yaquis, to whom the prosecution claimed he furnished arms and ammunition, were already in rebellion against the Mexican government and came to the United States for the sole purpose of securing such arms and supplies and returning therewith to Mexico, and if plaintiff in error did not say or do anything other than give such arms and supplies to those Yaquis, he was not guilty of the charge laid in the indictment. The trial court refused the proffered instruction without any misunderstanding whatever concerning plaintiff in error's theory and contention as expressed therein. Judge Wilbur correctly summarizes that theory and contention and yet rejects it. Plaintiff in error was certainly entitled to have the jury instructed upon the subject matter of the instruction which he proposed and which the court refused to give. We are satisfied that that instruction, when closely analyzed by the court, will not be characterized as too broad or sweeping. Upon reconsideration, we are satisfied that this court will conclude that if the proposed instruction had been given the jury would simply have been advised that if the Yaquis, to whom the prosecution claimed that plaintiff supplied arms and ammunition, were already in rebellion and if they came to the United States for the sole purpose of obtaining such arms and supplies and returning therewith to Mexico, and if plaintiff in error gave them such supplies and ammunition and did absolutely nothing else, he could not be found guilty. Let us briefly quote the concluding clauses of the proposed instruction:

> "then **such furnishing of ammunition and provisions** woud not constitute either a military en-

> terprise or a military expedition, as those terms are used in the statute of the United States on which this prosecution is based,"

and

> "a conspiracy **MERELY** to furnish ammunition and provisions to Yaqui Indians who had come from Mexico and were intending to return to Mexico, under the circumstances above mentioned, would not be an offense against the United States."

Manifestly, if the instruction had been given the jury would have been advised as to the kind of a verdict to render, if they found that plaintiff in error **MERELY** furnished ammunition and provisions to those Yaquis and stopped there. The instruction which the court refused was vital to the defense. It fully advised the court of plaintiff in error's theory, and we submit that if there was any technical mistake or error in that instruction the court should have either corrected it, or otherwise instructed the jury on the general subject-matter of the proposed instruction. Quite to the contrary, however, the court advised the jury in direct opposition to the proposed instruction and to the theory of the defense enunciated therein, when it gave the following instruction:

> "To provide the means for such an enterprise is within the statute. To constitute this offense, the individual need not engage personally in the expedition. **If he furnish the munitions of war, provisions, transportation, clothing, or any other necessaries to men engaged in the expedition, he is guilty, for he provides the means to carry on the expedition."** (Tr. p. 216.)

It is respectfully contended that the action of the trial court in refusing the requested instruction, in not instructing the jury on plaintiff in error's theory of the case, of which the court was fully advised, and in giving instructions in repudiation of that theory, constituted error, for which the judgment should be reversed.

IV.

THE INDICTMENT, TAKEN BY ITS FOUR CORNERS, CHARGED PLAINTIFF IN ERROR WITH CONSPIRING TO SET ON FOOT AND PROVIDE THE MEANS FOR A MILITARY EXPEDITION TO BE CARRIED ON FROM MEXICO AND NOT FROM THE UNITED STATES.

Plaintiff in error reiterates his contention that the indictment charged him and his co-defendants with setting on foot and providing and preparing the means for a military expedition, **the object of which was the inciting of armed rebellion in the Republic of Mexico of the citizens of said Republic of Mexico against the government and authority there.** Such a military expedition or enterprise must needs be one to be carried on from Mexico and not from the United States, even though the indictment charges that the enterprise was one to be carried on from Tucson, Arizona. (*Trumbull v. United States,* supra.) The evidence too discloses that if plaintiff in error was directly or indirectly connected with any military expedition or enterprise, it was one to be carried on from Mexico and not from the United States. This general subject is fully discussed in our main brief

and we will not burden the court with any unnecessary repetition here.

In conclusion, it is respectfully submitted that for the reasons hereinabove stated, the court should grant a rehearing of this cause.

Dated, July 17, 1929.

JAMES D. BARRY,
FRYER & CUNNINGHAM,
Attorneys for Plaintiff in Error and Petitioner.

SULLIVAN & SULLIVAN AND
THEO J. ROCHE,
EDWARD I. BARRY,
Of Counsel.

CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for plaintiff in error and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, July 17, 1929.

EDWARD I. BARRY,
Of Counsel for Plaintiff in Error and Petitioner.

—*No.* 5483—

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

———o———

JOSE GANDARA,
Plaintiff in Error

VS.

THE UNITED STATES OF AMERICA
Defendant in Error.

———o———

REPLY TO PLAINTIFF IN ERROR'S PETITION FOR REHEARING

———o———

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REPLY TO PLAINTIFF IN ERROR'S PETITION FOR REHEARING

—o—

Defendant in error respectfully submits its reply to the petition for rehearing filed by plaintiff in error.

Before undertaking to answer the contentions raised by plaintiff in error it is desired to call to the Court's attention the fact that several new matters have been injected into this case for the first time. While we are well acquainted with the rule that mat-

ters of fundamental error may be raised at any time, we cannot help but feel that to raise the quesiton as to the construction of an indictment for the first time upon a petition for rehearing is improper and contrary to the settled principles of justice. As said in the case of Merriam v. Chicago & E. I. R. Co., 66 Fed. Reporter 663:

> "*** When the court has correctly decided the questions upon which its judgment has been invoked by the appellants, they cannot, as a matter of right, require the court to consider any other questions upon a petition for a rehearing. If such a practice were permitted the case might be presented in parcels, and the litigation would, in this manner, be needlessly protracted, and this principle applies with peculiar force where, as in the present case, counsel ask a rehearing to enable them to present the case upon a theory in conflict with the course of their original argument. Fuller v. Little, 61 Ill. 22; Yater v. Mullen, 24 Ind. 277; Brooks v. Harris, 42 Ind. 177,180. It is, by the well-settled principles of the law, too late to present a question for the first time on a petition for a rehearing, and, in consenting to consider that question in the present instance, we do mean to make an innovation which shall be regarded as a precedent in future cases * * *."

We will however, answer the contentions of plaintiff in error in the order raised in their petition.

I

The first contention raised in the petition is:

THAT UNDER THE INDICTMENT, PROPERLY CONSTRUCTED, THE ONLY ALLEGED CONSPIRATORS WERE PLAINTIFF IN ERPOR, BISHOP NAVARETTE, AND DEFENDANTS BORGARO AND VALENZUELA. BISHOP NAVARETTE WAS ACQUITTED, A NOLLE PROSEQUI WAS ENTERED AS TO BORGARO AND VALENZUELA, AND PLAINTIFF IN ERROR ALONE WAS CONVICTED. INDIVIDUALLY, HE COULD NOT HAVE COMMITTED THE CRIME OF CONSPIRACY.

Plaintiff in error has very ably presented his idea of how the indictment properly construed could not possibly have charged a conspiracy against him alone, as all of the other defendants were liberated and that the allegation that he "conspired with divers other persons to the grand jurors unknown" adds nothing because it is used in the part of the indictment wherein the charge is made in the wording of the statute.

In furtherance of this attempted construction of the indictment, plaintiff in error quotes that portion of the indictment appearing on page 5 of this petition for rehearing, and argues therefrom that the indictment, "charged that the defendants and the defendants alone, entered into the conspiracy * * *." We would direct the court's attention to the first three lines of such quotation reading: "that is

to say, THE SAID DEFENDANTS *did conspire* to set foot and provide and prepare the means for an enterprise * * *." This language read piece meal as suggested by plaintiff in error is not an allegation of confederation until reference is had to that part of the indictment which charges: "did knowingly, willfully, unlawfully, feloniously and corruptly conspire, combine, confederate and agree together and *with divers other persons*, whose names are to the grand jurors unknown * * *." Certainly it is impossible to say that the words "defendants did conspire" mean the defendants did conspire together or did conspire with others in the absence of any direct averment to that effect, and necessarily the pleader intended, and the defendant before his trial must have understood, that he, Gandara, was charged with having conspired with his co-defendants and with divers other persons to set on foot the enterprise specified in the indictment.

In support of his contentions the cases of Feder v. United States 257 Fed. 694 and State v. Jackson 7 S. C. 283 are relied upon.

The Feder case supra) does not support his contention for there the court said: "The indictment charges these two defendants only; contains no allegation that they were but part of a larger body of conspirators, not the usual averments, that they conspired and agreed not only with themselves, but

with '*other persons to the grand jurors unknown*'."

The Jackson case (supra) is the same effect.

It is also well settled that an indictment in the words of the statute is sufficient.

Rudner v. United States 281 Fed. 516.

Montoya v. United States 262 Fed. 759.

It is true beyond question that the union of minds of at least two persons is a prerequisite to the commission of the crime of conspiracy. And in the case at bar there was, we earnestly contend, a union of minds. The union of minds in this case could have been between two different classes of persons named in the indictment. FIRST: The union of minds and conspiracy between Gandara and other divers persons to the grand jurors unknown. It is the settled rule by the weight of authority that where only one of any number of defendants is found guilty, the conviction will stand where there is evidence supporting an allegation of "other persons to the grand jurors unknown."

Donegan v. United States (CCA 2nd Circuit) 287 Fed. 641;

This rule is also supported in the case of United States v. Vannatta 278 Fed. 559 wherein the court said:

> "The defendant also objects by his demurrer to the indictment on the ground that but one

defendant is named, although Farrell is alleged to have been one of the conspirators. In the case of Feder v. United States, 257 Fed. 694, 168 C. C. A. 644, 5 A. L. R. 370 (C. C. A. 2nd Circuit), it was expressly held that a charge of conspiracy might be tried against one defendant alone, if two persons were shown to have been concerned in the conspiracy. The court also held that, if one of two conspirators should be found not guilty of conspiring, the charge must fall as to both. But in that case the indictment alleged that two defendants conspired with each other, and there was no charge in any form that others were concerned in the conspiracy.

"In the case at bar, the indictment charged that others were concerned in the conspiracy, of whom Farrell alone is named, and Farrell is not made a defendant, for reasons known only to the grand jurors, or to the district attorney. A natural inference is that the government did not desire to arrest or arraign Farrell on the charge, perhaps with the idea of using him as a witness. But this does not affect the validity of the indictment. So long as the charge of conspiracy is an allegation that the defendant Vannatta, was conspiring with one or more other persons, the charge of conspiracy will lie against him alone."

This was in the district court and the question was raised on demurrer. The defendant Vannatta was convicted and raised the same question on appeal to the Circuit Court of Appeals, Second Circuit, in the case of Vannatta v. United States 289

Federal Reporter 424, where the conviction was upheld and affirmed, the rule of law approved, and the Feder case (supra) cited.

SECOND: The union of minds and conspiracy between Gandara and Esteban Borgaro, or between Gandara, Esteban Borgaro, and "the other persons to the grand jurors unknown."

Plaintiff in error contends that if all of the conspirators, excepting one, are either acquitted or released upon a nolle prosequi, the basis of the charge is removed and the remaining defendants cannot properly be convicted. In support of that rather broad rule of law the Feder case (supra) is cited. As heretofore mentioned the Feder case was a case in which two defendants only were charged and one only was convicted. In that case the court reviews the authorities and cites and distinguishes the case of Brown v. United States, 145 Federal, which held that the jury might well have convicted the one person ultimately held guilty for conspiracy, not with the defendant to whom a new trial was awarded but with the absent defendant named, and the persons to the grand jurors unknown. The Feder case refuses to follow the Brown case (supra) because of the fact that in the Feder case no persons to the grand jurors unknown were named in the indictment and because the conspiracy was reduced by the terms of the indictment to only two persons.

Plaintiff in error also contends that he was entitled to know of the nature of the charge against him, and that the indictment was faulty inasmuch as it failed to give him that information. If this contention is seriously pursued, it is perhaps a sufficient answer to state that it is too late for such a question to be raised for the first time upon petition for rehearing, when no motion, demurrer, bill of particulars or other pleading has been filed below.

However, assuming that this contention is now properly raised, we still contend that Gandara was informed of the nature of the crime with which he was changed and that not only was the offense charged in the language of the statute but was also explained in ten overt acts. An overt act, is of course one of the necessary elements to a conspiracy, and another purpose is to inform the defendants of the nature of the charge against them. Without setting out the indictment in full it is desired to call to the court's attention overt act ten (T.R. page 7) which is as follows:

> "And the Grand Jurors aforesaid, on their oath aforesaid, do further present:
>
> "That, in furtherance of said conspiracy, and to effect the object and purpose thereof, the said JOSE GANDARA, between May 1, and June 20, A. D. 1927, the exact date being to the Grand Jurors unknown, at a certain point near Tucson ,within said District of Arizona, did *arrange plan* with divers persons whose

names are to the Grand Jurors unknown for the organization of certain Yaqui Indians into an armed body and did then and there organize said Yaqui Indians into an armed body for the purpose of marching from the State of Arizona, within the United States of America, to the Republic of Mexico, with the intent then and there to make war upon the Government of the said Republic of Mexico, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States ofAmerica."

Can it then be seriously contended that the indictment properly construed fails to state or charge an offense against plaintiff in error? There would be only one possible chance of having the indictment "properly construed" so as to come within the rule of the Feder case (supra) and in an attempt to do this plaintiff in error asks that the reference in the indictment to the "divers other persons" whose true names are to the grand jurors unknown be ignored.

We are confident that no substantial element of the crime has been omitted from the indictment.

In the case of People v. Olcott 2 Johns Cas. (N. Y.) 310, 1 American Decisions 168, cited in the Feder case (supra) it was held that although the union of minds of at least two persons is a prerequisite to the commission of the crime of conspiracy, yet one may be convicted after the other accused is

dead before conviction. Wherein is this principle of law different from the situation at bar (assumming the absence of "other persons to the grand jurors unknown"); Gandara is found guilty, as to his co-defendant Esteban Borgaro, Jr., the jury is unable to agree and he is then held subject to a retrial. Later, however, the district attorney dismissed the case against him. Can it be said that the later dismissal of the case against Borgaro operates to release Gandara? The one Federal case just touching this question, but not definitely deciding it, is Miller v. United States (C. C. A. 4th circuit) 277 Federal 721 where the court said on page 726:

> "The last error assigned is the refusal of the court to arrest or suspend judgment, on the ground that conviction of one of two defendants charged with conspiracy could not be the basis of judgment against him while the charge against the other was undisposed of. One of two defendants charged with conspiracy may be separately tried. If one is acquitted, the other must be acquitted also, since he cannot commit the offense alone; and if the charge against one be nol. pros'd the other cannot *afterwards* be convicted, because there is no pending charge against two. State v. Jackson, 7 S. C. 283, 24 Am. Rep. 476; Feder v. U. S., 257 Fed. 694, 696, 168 C. C. A. 644, 5 A. L. R. 370.
>
> "The rule that each of two persons charged with conspiracy may be tried separately negatives the proposition that judgment on the conviciton of one must be arrested until the other is tried. *What would be the effect of a future*

acquittal of Hayes, or a nol. pros. of the indictment as to him, it is not our province at this time to decide."

"Affirmed." (*Italics ours.*)

We, therefore, submit that in any event, regardless of how plaintiff in error construes the indictment that it was good in substance.

Plaintiff in errors final contention is that even if the indictment properly construed did charge the defendant Gandara, with conspiring with divers other persons to the Grand Jurors unknown, that the record will be searched in vain for evidence establishing that there was any conspiracy between plaintiff in error and any Yaqui Indians or with any unknown or unnamed persons.

That is a rather broad and sweeping statement and although we do not wish to burden the Court with again reviewing the evidence in this case, we feel that to fully answer this contention some of the testimony should be noted. We, therefore, respectfully call the Court's attention to the following testimony in this case.

> Taking first the testimony of John Wren (Tr. p 52) where, i nspeaking of conversations he had with Gandara, he said: "He made a statement down at the Border Patrol and went on to tell about furnishing the Yaquis with arms and ammunition, provisions and different things for making the trip into Mexico, said that he was to lead them and *that they intended* to go

on probably a Sunday before that, but something came up with deference to *some of them* being not ready to go* **"

The testimony of Antonio Molino (Tr. p. 54) was as follows:

"The same day that Gandara came there with Chito Valenzuela and *Miguel Mantuma*, he told them to go with him and say that as soon as he got to the river with the rest of the Yaquis, that he would fix everything up down there. He said that if he could fix everything up in a good way with the rest of the Yaquis, that he would come back."

"After Gandara talked, I am awful old man, of the age I have got, I said, I made a remark to the rest of the Yaquis, that don't seem very good to me. He said, 'I don't know.' And then I made the remark that there might be something happen in this affair, and then Chito and Miguel with the matter, and they said, 'You beat me with those words that you said.' "

Certainly this testimony showed that Gandara, Miguel Mantuma and the Yaquis discussed the matter, this evidence was sufficient to go to the jury on the question of Gandara's conspiracy "with other persons unknown" who might have been for example Mantuma, and clearly is sufficient to go to the jury on the question as to whether he might have conspired with some of the Yaquis.

Take the testimony of Jose Gandara himself where he says: Tr. p. 173).

"I got some eight or ten thousand rounds of seven millimeter ammunition. I gave it to the Yaquis, also *with the understanding that they were to hold that ammunition, bury it and hold it until I* told them—Well I was waiting momentarily for a word from friends that I have in El Paso and in Washington, expecting the arms embargo to be lifted. . ."

Again (Tr. p. 175) he said: "I held the Yaquis back here, and that is one of the reasons I had a great deal of trouble, that I did not intend them to send that before then. I did not intend them to leave, that is, with any ammunition that I had furnished, before the embargo was lifted; I asked them *specifically to remain here until we were ready.* I did not explain to the Indians anything about the embargo or what I had in mind, my reason for delaying them. I just told them they should believe me, and I knew better. Their mind is rather small for that. *And because of my request, the Yaquis at this village waited—remained here.*"

And in numerous other places with which we will not burden the Court it is clear that Gandara had an understanding with these Yaquis even to the point of a specific agreement, while the law does not require that there need be a specific agreement proven to authorize a conviction under a charge of conspiracy.

The rule is as stated in "Underhills Criminal Evidence," Section 717, page 953: "It need not be shown that the parties actually came together and agreed in express terms to enter in and pursue a common design. The existence of the as-

conspiring with persons to the grand jurors unknown, if the evidence satisfies the jury, beyond a reasonable doubt, that, although the defendants may not have conspired together, yet if one of them did, in fact, with some third person not named in the indictment, and unknown, to commit the offenses charged, and either one of such persons did any one of the overt acts charged, the defendant who so conspired may be found guilty.' "* * * *.

III

The third contention of plaintiff in error is that "THE THEORY OF THE DEFENSE WAS NOT ONLY IGNORED BY THE TRIAL COURT, BUT IT WAS ENTIRELY REPUDIATED BY INSTRUCTIONS DIRECTLY OPPOSED TO IT."

It is not to be doubted that plaintiff in error had a theory of defense based on the case of Trumbull v. United States, 48 Fed. 99, and it is *possible* that had the facts of the Trumbull case been similar to the case at bar, the refusal of an instruction properly worded and asked for might have been error.

The trial judge has a certain amount of discretion in instructing the jury and if the instructions given fairly state the law on the question, so as to enable the jury to fairly pass on the evidence and to arrive at a fair and just verdict, there can certainly be no objection to the refusal of the trial judge to give a requested instruction, when it does

not correctly state the law, for as said, in the case of Blanton v. United States, 213 Fed. 320:

> "A requested instruction is properly refused unless it ought to have been given in the very terms in which it is proposed. Brooks v. Marbury, 11 Wheat. 78, 6 L. Ed. 423."

We again wish to emphasis the fact that the only exception taken below was the failure of the trial court to give a certain instruction. And plaintiff in error now for the fiirst time raises the question that the trial court should have instructed the jury on the theory of his defense, and we earnestly contend that it is now too late and is improper for plaintiff in error to raise this question.

It is conceded by plaintiff in error in his brief filed in this cause on appeal (page 4) that the court instructed the jury generally on the law of conspiracy and on the neutrality statute, and takes exception merely on the ground of the refusal of the court to instruct on the defendant's theory of the case.

A trial judge having before him all of the evidence in a case, and having heard the testimony of all of the witnesses has undoubtedly the right to instruct the jury generally on the law and refuse an instruction based on a case wherein the facts are so different that an instruction based on the case would be misleading and confusing.

Now taking the requested instruction of the plaintiff in error in the case at bar, upon the refusal of which error is predicated, which counsel for plaintiff in error maintains is based on the Trumbull case which was as follows:

> "The jury are instructed, if prior to the commission of any of the acts charged in the indictment, a revolution or revolt of the Yaqui Indians was in existence in the Republic of Mexico in which armed forces of the said Indians were in conflict with the military forces of the Mexican government, and if members of such armed forces of the Yaqui Indians came to the United States for the purpose of securing munitions of war and provisions, and then returning to rejoin the forces of such Indians in Mexico, and the defendant Gandara furnished ammunition or provisions only for such Indians as had come from Mexico, *and intended* to return to Mexico, and not to recruit or secure other Indians to go to Mexico, then such furnishing of ammunition and provisions would not constitute either a military enterprise or a military expedition as those terms are used in the statute of the United States on which this prosecution is based, and the defendant, Gandara, would not be guilty of beginning, setting on foot, or furnishing means for any military expedition or military enterprise, and a conspiracy merely to furnish ammunition and provisions to Yaqui Indians who had come from Mexico and were intending to return to Mexico under the circumstances above mentioned, would not be an offense against the United States." * * * *.

Now before interpreting that instruction where-

in does the Trumbull case (supra) support the instruction so as to entitle the plaintiff in error to have it given in the case at bar. Judge Ross in his opinion says:

> "* * * * 'The very terms of that statute imply that the military expeditions or enterprises thereby prohibited are such as originate within the limits of the United States and are to be carried on from this country. 'Every person who, within the limits or jurisdiction of the United States, begins or sets on foot or provides or prepares the means for any military expedition or enterprise to be carried on from thence, —That is to say, from the United States,—is the language of the statute. If the evidence shows that in this case there ever was any military expedition begun or set on foot or provided or prepared for within the sense of this statute, it was begun, set on foot, provided and prepared for in Chile and was to be carried on from Chile and not from the United States. But I think it perfectly clear that the sending of a ship from Chile to the United States to take on board arms and ammunition purchased in this country and carry them back to Chile, is not the beginning, setting on foot, providing or preparing the means for any military expedition or enterprise within the meaning of Section 5286 of the Revised Statutes.' " * * * *.

Analyzing this opinion, and keeping in mind the fact that Judge Ross had directed a verdict, we find the case holding as follows:

1. That the military expeditions or enterprises prohibited by the statute are such as originate with-

in the limits of the United States and are carried on from the United States.

2. That from the *evidence* in the Trumbull case it is his opinion (based on a motion for a directed verdict) that if there was any military expedition at all, it was begun or set on foot, or provided or prepared for in Chile and was to be carried on from Chile.

3. Also that in his opinion (from the evidence heard by him) that the sending of the Itata to the United States to take on arms and ammunition purchased here was not a violation of the neutrality statute.

The district judge in the case at bar charged the jury in part as follows:

> "The beginning, the setting on foot, or the providing or procuring materials for such an expedition or enterprise *must be within the territory or jurisdiction of the United States, and to be carried on from thence*, against the territory or dominion of some foreign state, colony, district, or people, with whom the United States were at peace."

And again the judge instructed the jury as follows:

> "Before a jury can convict, it must be proven to their satisfaction that the expedition or enterprise was in its character military: or, in other words, it must have been shown by com-

petent proof that the design, the end, the aim, and the purpose of the expedition or enterprise was some *military service, some attack or invasion* of another people or country, state or colony as a military force."

We earnestly contend that the instruction given by the trial judge gave plaintiff in error the protection of the rule of law announced by Judge Ross in the Trumbull case.

Can it then be said that the facts in the Trumbull case are so similar to the case at bar as to have required the court below to practically say to the jury that if they found that, routed and beaten forces of from 27 to 150 Yaqui Indians came to the United States to re-equip themselves, re-organize themselves and then again invade Mexico and that if Gandara were to equip them, carefully giving arms only to those that had intended to return, that he would not have violated the law?

That is in substance the trend of the requested instruction. The Trumbull case certainly does not support such a rule.

It is useless at this time to review the evidence of the case as the matter has been heretofore submitted to this court. In the opinion rendered by this court Judge Wilbur clearly recognized the distinction between the Trumbull case and the case at bar where in his opinion he says:

"* * * * It is clear that the enterprise or expedition was to be carried on from Tucson, Arizona against the Mexican government for the reason that the Yaqui Indians, in leaving the territory of Mexico ipso facto abandoned their operations against the Mexican government and could only resume them after their return with means to be obtained in the State of Arizona. Their intent to return to that nation for the purpose of further hostilities did not alter the fact that they ceased to exist as a military force upon entering the United States. The expedition, when it entered the United States, was headed in the wrong direction to engage in hostilities in Mexico. The retreating Yaqui Indians were powerless to operate as a military force from Sonora, or from their bases in Mexico, it was only by finding a new source of supplies or a new base that they could become a military expedition. That proposed base was Tucson, Arizona. If and when they secured such means their return as an organized unit constituted a military expedition from our neutral territory within the meaning of the law, regardless of whether or not they intended themselves to attempt to overturn the government of Mexico or join other forces engaged in that effort. * * * *

Then after discussing the Trumbull case he says:

"* * * * We cannot extend the principle of that case to the situation here where the Yaqui Indians who came to this country had exhausted their military power, and had fled from the scene of battle to obtain new means for the resumption of hostilities after their return. To knowingly furnish such means for the express purpose of such enterprise was to equip an ex-

pedition to be operated from our neutral territory. There was no error in refusing the proposed instruction." * * * *

And Judge Dietrich in his opinion recognizes and points out the distinction between the Trumbull case and the case at bar where he says:

"* * * If individual Indians straggled in from Mexico for the purpose of remaining here an indefinite time and procuring ammunition and clothing for themselves with the hope of thereafter returning to Mexico and if defendant thereupon sold to them individually such supplies and did nothing more, it probably would not be contended that he would be guilty of the charge. * * * * The mere fact that a rebellion or revolt had been in progress prior to the alleged misconduct of appellant and that participants therein fled to this country with the hope of some time returning and again engaging in the struggle is not conclusive in defendant's favor. Assuming, as some of the evidence tends to show, that they straggled in either individually or in small groups without organization or leadership expecting at some time in the future, when and if they procured the necessary clothing, arms and ammunition, to return and continue the rebellion, and that appellant, knowing of these conditions and expectations, gave assistance by assembling for them large quantities of ammunition and furnishing them with clothing and other supplies, and by meeting and talking with them encouraged them to keep up the struggle, and assisted them in making preparations to go back for military purposes in a body or in large groups taking with them the military stores he

had enabled them to assemble, he might be held chargeable under the law though no new recruits were enlisted. To use United States territory for such purposes would be within the mischief of the statute; the enterprise would be of a military character, and new although made up of old elements."

Judge Diterich then discusses the proposed instructions showing wherein it was too broad and sweeping to have been given.

The evidence in the case shows conclusively that these Yaquis did straggle in, routed, beaten and wounded. That some were intending to return when and if they were equipped, and that Gandara exhorted them, met with them and was going to lead them in an invasion of Mexico. Gandara's own testimony shows this to be a fact. His only excuse was that he was waiting for the embargo to be lifted.

The Yaquis could not have operated again as a military unit until someone gave them the help and means to re-organize.

IV

The fourth and final contention of plaintiff in error is that "THE INDICTMENT, TAKEN BY ITS FOUR CORNERS, CHARGES PLAINTIFF IN ERROR WITH CONSPIRING TO SET ON FOOT AND PROVIDE THE MEANS FOR A MILITARY EXPEDITION TO BE CARRIED

ON FROM MEXICO AND NOT FROM THE UNITED STATES."

This contention is not argued by plaintiff in error and reference is made to their main brief on this question. The subject matter of this contention has been answered in our discussion of the Trumbull case, upon which their point is based.

In conclusion we respectfully submit that plaintiff in error was afforded a fair trial, that he was tried under a valid indictment, that his rights were fully protected by the trial court and further that the refusal of the trial judge to give the requested instruction based on the Trumbull case was proper when taken in light of the undisputed testimony in this case.

The petition for rehearing should be denied.

Respectfully submitted,

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Attorneys For Defendant in Error

No. 5485

United States
Circuit Court of Appeals
For the Ninth Circuit.

G. D. COLLINS and S. S. MILLARD,
Appellants,

vs.

WILLIAM I. TRAEGER, as Sheriff of the County of Los Angeles, State of California,
Appellee.

Transcript of Record.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

Filmer Bros. Co. Print. 330 Jackson St., S. F., Cal.

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Filmer Bros. Co. Print. 330 Jackson St., S. F., Cal.

INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Index.

NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

For Appellants:

G. D. COLLINS, 506 Claus Spreckles Building, 703 Market Street, San Francisco, California.

ISADORE MORRIS, Esq., Los Angeles, California.

For Appellee:

A. S. KEYES, District Attorney of Los Angeles County, California; and

TRACY C. BECKER, Deputy District Attorney of Los Angeles County, California.

In the District Court of the United States in and for the Southern District of California.

In the Matter of the Petition of G. D. COLLINS for the Writ of Habeas Corpus in Behalf of S. S. MILLARD.

COMPLAINT AND PETITION FOR THE WRIT OF HABEAS CORPUS.

To the Honorable the District Court of the United States in and for the Southern District of California and the Honorable WM. P. JAMES, One of the Judges of Said Court:

I.

This the complaint and petition of G. D. Collins respectfully shows to you that he is a citizen of the

United States and of the State of California. That he presents this complaint and petition in behalf of the said S. S. Millard, with his consent and at his request. That said Millard does not make and verify the petition as he is imprisoned in the county jail of the county of Los Angeles, State of California, and for that reason is unable to do so. That the necessary delay in an attempt to have him do so might entail his possible removal beyond the jurisdiction of the court before he could sign and verify the petition.

That said Millard is now imprisoned and restrained of his liberty by William I. Traeger, the sheriff of said county of Los Angeles, and in the county jail in the city of Los Angeles in said county, under and by virtue of certain void interstate rendition proceedings and by the alleged authority of a void warrant of rendition heretofore issued by the Governor of the State of California or requisition of the Governor of the State of Illinois and against the said Millard.

II.

That said S. S. Millard is thus imprisoned and held in said custody under color of the authority of the Constitution and laws of the United States, relating to the return of fugitives from justice to the state from which they fled. [1*]

That said sheriff claims to hold said Millard in said custody and imprisonment for the purpose of his being transported to said State of Illinois under

*Page-number appearing at the foot of page of original certified Transcript of Record.

and by virtue of said warrant and process. That a copy of said warrant has been requested and refused; that the legal fees for said copy were tendered prior to such refusal. That there is reason to fear that said prisoner will be removed from the jurisdiction of said court while these proceedings for his discharge on habeas corpus are pending.

III.

Your petitioner avers that said imprisonment is illegal and in violation of the Constitution and laws of the United States, for the following reasons, viz.:

1. That the accusatory affidavit on which said rendition proceeding is solely based does not charge the said Millard with treason, felony or other crime nor was such affidavit on file in any court at the time of the issuance of said requisition and at the time of the issuance of said warrant of rendition nor subsequent thereto. That there is no indictment found or filed against the said Millard.

2. That the said Millard did not flee from justice in said State of Illinois nor take refuge in said State of California and is not a fugitive from justice and committed no crime in said State of Illinois.

3. That there is no affidavit made before a magistrate of said State of Illinois, charging said Millard with having committed treason, felony or other crime. That the only accusatory affidavit in said rendition proceedings and on which said warrant of rendition is solely based is one made before one of the Judges of the Municipal Court of Chicago. That a Judge of the said Municipal Court of Chi-

cago is not a magistrate, in that he is denied by the laws of Illinois the power to issue a warrant of arrest.

4. That said interstate rendition proceedings have been instituted in bad faith and in perversion of the Constitution and laws of the United States, in that as your petitioner is informed [2] and verily believes and upon his information and belief alleges that said accusatory affidavit was made and sworn to and said interstate rendition proceedings were instituted by one, Leon E. Goetz, the accuser of said Millard, solely for the purpose of extorting in behalf of himself and the U. S. Health Film, Inc., a corporation, and from said Millard by means of said accusation certain negatives and prints of certain movie pictures and claimed by said Goetz and said corporation under two certain contracts in writing, of date November 4th, 1927, executed by said corporation and said Millard. That said Millard contends and claims in said suit that said Goetz and said corporation have no right to said negatives and prints nor any of them, and that said corporation is in default in the performance of the provisions in said contracts on its part to be performed. Your petitioner avers that said contracts and matters are involved in the issues presented in said suit, to wit: in a certain suit in equity in the United States District Court, Northern District of Illinois, Eastern Division, commenced by said Millard as plaintiff on the 6th day of March, 1928, and against the said U. S. Health Films, Inc., defendant, the corporation named in said accusation. That said

suit was filed in said United States District Court prior to the making of said accusatory affidavit and prior to said interstate rendition proceedings. That said suit in equity is still pending in said United States District Court, awaiting trial and decision therein. That said accusatory affidavit is in fraud and in violation of the jurisdiction of said United States District Court, Northern District of Illinois, Eastern Division, in said case.

5. That upon the facts herein averred the said imprisonment of said Millard is in violation of section 2 of Article IV of the Constitution of the United States and of the "due process of law" clause in the Fourteenth Amendment of the said Constitution and in violation of section 5278 of the Revised Statutes of the United States. [3]

IV.

WHEREFORE your petitioner prays that the writ of habeas corpus be ordered to issue out of and under the seal of the said United States District Court in and for the Southern District of California, directed and addressed to the said William I. Traeger, the sheriff of said county of Los Angeles, State of California, commanding him to produce the said S. S. Millard before your Honorable Court at a time and place in said writ designated then and there to do whatsoever shall be ordered by the Court concerning him. That upon the hearing of the case on return to the said writ of habeas corpus, it be by the Court adjudged that said imprisonment of said Millard is illegal and in violation of the Constitution and laws of the United States and that

said Millard be ordered discharged therefrom and restored to his liberty. That in the meantime and pending said habeas corpus proceedings, the said Millard be admitted to bail.

G. D. COLLINS,
Petitioner *in pro. per.* [4]

United States of America,
Southern District of California,
City and County of Los Angeles,—ss.

G. D. Collins, being duly sworn, deposes and says that he is the petitioner herein; that he has read the foregoing petition and complaint and knows the contents thereof; that the same is true of his own knowledge except as to matters therein stated on his information or belief; that as to those matters he believes it to be true.

G. D. COLLINS.

Subscribed and sworn to before me this 17th day of April, 1928.

[Seal] MYRTLE V. HITCHCOCK,
Notary Public in and for the County of Los Angeles, State of California.

My commission expires March 31, 1929. [5]

ORDER GRANTING WRIT OF HABEAS CORPUS.

Upon the foregoing complaint and petition and good cause appearing therefrom, it is ordered that the writ of habeas corpus issue herein and out of and under the seal of the United States District Court, Southern District of California, as prayed

for in said complaint and petition and returnable before said court on the 20th day of April, 1928, at 10 o'clock A. M. on that day, and at the courtroom of said court in the City of Los Angeles, County of Los Angeles, State of California.

Dated this 17th day of April, 1928, at said City of Los Angeles.

WM. P. JAMES,
United States District Judge. [6]

PETITIONER'S MEMORANDUM OF POINTS AND AUTHORITIES.

I.

In support of the point that the United States *District will* grant the writ of habeas corpus in interstate rendition cases, we cite:

Ex parte Graham, 216 Fed. 813;
Ex parte Morgan, 20 Fed. 298, 302.

II.

That the accusatory affidavit in cases where there is no indictment, is jurisdictional, and essential to the validity of interstate rendition proceedings, we cite:

Ex parte Spears, 88 Cal. 642, 643;
Ex parte Smith, 3 McLean, 121;
2 Moore on Extradition, sec. 555.

III.

That it is essential the accusatory affidavit be made before a magistrate, we cite:

Rev. Stats. U. S., sec. 5278.

That the Judge of the Chicago Municipal Court

is not a magistrate because under the laws of Illinois he has no authority to issue the warrant of arrest, we cite:

25 Corpus Juris, 264.

IV.

That interstate rendition proceedings are void if not *bona fide* or if in perversion or in fraud of the law, we cite:

Ex parte Slauson, 73 Fed. 666;
In re Cannon, 47 Mich. 481, 486, 487;
Tenn. vs. Jackson, 36 Fed. 258;
Church on Habeas Corpus (2d ed.), pg. 829 and note;
25 Corpus Juris 257.

V.

The law is well settled that the accused has a right to show on writ of habeas corpus that he is not a fugitive from justice.

Respectfully submitted,

G. D. COLLINS,
Petitioner. [7]

[Title of Court and Cause.]

WRIT OF HABEAS CORPUS.

United States of America,
Southern District of California,—ss.

The President of the United States of America to William I. Traeger, the Sheriff of the County of Los Angeles, State of California, GREETING:

You are by this writ commanded that you have

the body of S. S. Millard by you imprisoned and detained, as it is said, together with the time and cause of such imprisonment and detention, by whatsoever named the said S. S. Millard shall be called or charged, whether by the said name of S. S. Millard or by the name of Elid *Stanich,* or any other name, and bring him before the Honorable William P. James, Judge of the said United States District Court, at the courtroom thereof in the United States Postoffice Building, in the City of Los Angeles, on the 20th day of April, 1928, at 10 o'clock A. M. on that day, to do and receive what shall then and there be considered and ordered by said Court, concerning the said S. S. Millard.

AND HAVE YOU THEN AND THERE THIS WRIT.

WITNESS, Hon. WILLIAM P. JAMES, Judge of the United States District Court, Southern District of California, this 17th day of April, 1928.

ATTEST my hand and the seal of said court, the day and year last above written.

[Seal] R. S. ZIMMERMAN,
Clerk.
By Edmund L. Smith,
Deputy. [8]

RETURN ON SERVICE OF WRIT.

United States of America,
Southern District of California,—ss.

I hereby certify and return that I served the annexed writ of habeas corpus on the therein named W. I. Treager, Sheriff of Los Angeles

County, by handing to and leaving a true and correct copy thereof with Eugene Biscailuz, Undersheriff, personally at Los Angeles in said District, on the 17th day of April, 1928 A. D.

A. C. SITTEL,
U. S. Marshal.
By G. O. White,
Deputy.

[Endorsed]: Marshal's Crim. Doc. No. 22,954. In the District Court of the United States in and for the Southern District of California. In the Matter of the Petition of G. D. Collins for the Writ of Habeas Corpus in Behalf of S. S. Millard. Writ of Habeas Corpus. Filed Apr. 17, 1928. R. S. Zimmerman, Clerk. By B. B. Hansen, Deputy Clerk. [9]

[Endorsed]: 9094–J.—Cr. In the District Court of the United States in and for the Southern District of California. In the Matter of the Petition of G. D. Collins for the Writ of Habeas Corpus in Behalf of S. S. Millard. Complaint and Petition for the Writ of Habeas Corpus. Filed Apr. 17, 1928. R. S. Zimmerman, Clerk. By Edmund L. Smith, Deputy Clerk. G. D. Collins, 506 Claus Spreckles Bldg., 703 Market St., San Francisco, Calif. [10]

[Title of Court and Cause.]

RETURN TO WRIT OF HABEAS CORPUS.

To the Honorable District Court of the United States, in and for the Southern District of California:

I, William I. Traeger, Sheriff of the County of Los Angeles, State of California, do hereby make return to the writ of habeas corpus herein: That said writ was served on me on the 17th day of April, 1928, by serving upon me a copy thereof, which copy is hereto attached and made a part of this return.

That no petition for said writ, or any copy thereof in this proceeding, has ever been served upon me, nor has any writ, or any copy of such petition, been served upon the District Attorney of Los Angeles County.

That said S. S. Millard is in my custody, under and by virtue of a warrant issued out of and under the seal of the Municipal Court of the City of Los Angeles, a copy of which warrant is hereto attached and made a part hereof, charging the said Millard with being a fugitive from *the* justice of the State of Illinois; that, as I am informed and verily believe, a proper rendition warrant has been issued by the Governor of the State of California, after a full hearing upon the merits, for the rendition of the said Millard to the State Agent of the State of Illinois, for extradition to said state from the crime of feloniously and fraudulently obtaining from the

United States Health Films, Inc., a corporation, a sum of Twenty-five *Thousand* ($25,000.00) *in* money of the United States of America, by the means and use of the confidence game, as more fully appears by said rendition warrant, the original of which I will produce for the inspection of this Court, on the hearing of this writ. A copy of said rendition warrant is also herewith attached. [11]

I further return that prior to the issue and service upon me of the writ of habeas corpus, herein, a writ of habeas corpus had been obtained by the petitioner, and an order of the Superior Court of the State of California, in and for Los Angeles County, based upon a petition therefor alleging substantially the same facts and grounds for issuing such writ, as those which are set forth in the petition herein now on file in the office of the Clerk of this court, which said writ and habeas corpus proceeding in said State Court was in full force and effect and was pending at the time petitioner's application for this writ was verified and presented to this Honorable Court, and to the Honorable William P. James, the Judge thereof, who granted the order for this writ, and which said writ and proceeding in such State Court was returnable and set for a hearing in said State Court on said 17th day of April, 1928, at two o'clock P. M. of said day.

I herewith produce the body of the said S. S. Millard, and respectfully pray that said writ be dismissed, and that an order be granted remanding the said Elid Stanitch, *alias* S. S. Millard to the

custody of Robert E. Calkins, State Agent of the State of Illinois, as provided in and by said rendition warrant of the Governor of the State of California.

WILLIAM I. TRAEGER,
Sheriff, Los Angeles County.
By ASA KEYES,
District Attorney.
TRACY CHATFIELD BECKER,
TRACY CHATFIELD BECKER,
Deputy District Attorney. [12]

[Title of Court and Cause.]

WRIT OF HABEAS CORPUS.

(In ink: "Copy.")

United States of America,
Southern District of California,—ss.

The President of the United States of America to William I. Traeger, the Sheriff of the County of Los Angeles, State of California, GREETING:

You are by this writ commanded that you have the body of S. S. Millard by you imprisoned and detained, as it is said, together with the time and cause of such imprisonment and detention, by whatsoever name*d* the said S. S. Millard shall be called or charged, whether by the said name of S. S. Millard or by the name of Elid *Stanich,* or any other name, and bring him before the Honorable William P. James, Judge of the said United States District Court, at the courtroom thereof in the United States Post Office Building, in the City of Los

Angeles, on the 20th day of April, 1928, at 10 o'clock A. M. on that day, to do and receive what shall then and there be considered and ordered by said Court, concerning the said S. S. Millard.

AND HAVE YOU THEN AND THERE THIS WRIT.

WITNESS, Hon. WILLIAM P. JAMES, Judge of the United States District Court, Southern District of California, this 17th day of April, 1928.

ATTEST my hand and the seal of said court the day and year last above written.

[Seal] R. S. ZIMMERMAN,
Clerk.
By Edmund L. Smith,
Deputy. [13]

(Written in ink on inside of cover—bottom of page—is the following:)

Refer to Chief Clerk Calvert for return
WM. I. TRAEGER,
Sheriff.
By E. W. Biscailuz,
Under-sheriff.

Received in Main Office, Sheriff's Dept., at 3:20 P. M., April 17, 1928.
J. H. NASH,
Deputy.

[Endorsed]: In the District Court of the United States, in and for the Southern District of California. In the Matter of the Petition of C. D. Collins for the Writ of Habeas Corpus in Behalf of S. S. Millard. Writ of Habeas Corpus.

(In ink the word: "Copy.") [14]

Copy.

In the Municipal Court of the City of Los Angeles, County of Los Angeles, State of California.

THE PEOPLE OF THE STATE CALIFORNIA,
Plaintiff,

vs.

ELID STANITCH, *alias* S. S. MILLARD,
Defendant.

WARRANT OF ARREST.

The People of the State of California, to Any Sheriff, Constable, Marshal or Policeman in the County of Los Angeles, GREETING:

Information on oath having been this day laid before me by J. P. Filkas that the crime of obtaining money by use of confidence game has been committed by Elid Stanitch, *alias* S. S. Millard, in the county of Cook in the State of Illinois on or about the 23d day of March, 1928, and the said Elid Atanitch having been duly and regularly charged with the said crime at and in the said county of Cook, State of Illinois, before a duly and regularly elected, qualified and acting Judge of the Municipal Court of the City of Chicago in and for said County of Cook, State of Illinois, and the said magistrate having then and there duly and regularly issued his warrant for the arrest of the said Elid Stanitch charging the said Elid Stanitch with the said offense, and that the said offense is now pending before said magistrate and undetermined, and that a

warrant was duly and regularly issued by said magistrate upon said charge for arrest and apprehension of the said Elid Stanitch and placed in the hands of a proper officer for service, and it further appearing to me by complaint on oath herein that before the issuance of the said warrant of arrest as aforesaid by the said magistrate in the County of Cook, State of Illinois, as aforesaid and before the service of the said warrant that the said Elid Atanitch did leave the said State of Illinois and departed therefrom to the State of California, and that he is now in the City of Los Angeles, County of Los Angeles, State of California.

Therefore you are hereby commanded forthwith to arrest the above-named Elid Stanitch and bring him before me forthwith at my office [15] in the City of Los Angeles, County of Los Angeles, State of California, and in case of my absence or inability to act, before the nearest and most accessible magistrate in Los Angeles County. Dated at Los Angeles City Township, County of Los Angeles, State of California, at the hour of —— o'clock P. M., this 13th day of April, 1928.

[Seal] W. S. BAIRD,

Judge of the Municipal Court of the City of Los Angeles, County of Los Angeles, State of California.

Bail $25,000.00.

W. S. B. [16]

Copy.

STATE OF CALIFORNIA.

EXECUTIVE DEPARTMENT.

The People of the State of California, to Any Sheriff, Constable, Marshal, or Policeman of This State, GREETING:

WHEREAS, it has been represented to me by the Governor of the State of Illinois that Elid Stanitch, *alias* S. S. Millard, stands charged with the crime of confidence game committed in the County of Cook, in said State, and that he fled from the justice of that State, and has taken refuge in the State of California, and the said Governor of Illinois having, in pursuance of the Constitution and Laws of the United States, demanded of me that I shall cause the said Elid Stanitch, *alias* S. S. Millard, to be arrested and delivered to Robert E. Calkins, who is authorized to receive him into his custody and convey him back to the said State of Illinois,

AND WHEREAS, the said representation and demand is accompanied by a copy of complaint, warrant of arrest, certificate of Judge and clerk, affidavit certified by the Governor of the State of Illinois, to be authentic, whereby the said Elid Stanitch, *alias* S. S. Millard is charged with said crime; and it satisfactorily appearing that the representations of said Governor are true, and that said Elid *Stantich, alias* S. S. Millard is a fugitive from the justice of the aforesaid State;

YOU ARE, THEREFORE, required to arrest and secure the said Elid Stanitch, *alias* S. S. Millard, wherever he may be found within this State, and to deliver him into the custody of said Robert E. Calkins to be taken back to the State from which he fled, pursuant to the said requisition, he, the said Robert E. Calkins, defraying all costs and expenses incurred in the arrest and securing of the said fugitive.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the Great Seal of the State to be affixed, this the 11th day of [17] April, in the year of our Lord one thousand nine hundred and twenty-eight.

C. C. YOUNG,
Governor of the State of California.

By the Governor:

[Seal] FRANK C. JORDAN,
Secretary of the State of California.
By FRANK H. CORY,
Deputy. [18]

[Endorsed]: No. 9094–J.—Cr. In the District Court of the United States in and for the Southern District of California. In the Matter of the Application of G. D. Collins in Behalf of S. S. Millard, for a Writ of Habeas Corpus. Return to Writ of Habeas Corpus Filed Apr. 20, 1928. R. S. Zimmerman, Clerk. By Edmund L. Smith, Deputy Clerk. [19]

[Title of Court and Cause.]

ANSWER OF PETITIONER G. D. COLLINS TO RETURN TO WRIT OF HABEAS CORPUS.

To the Honorable the District Court of the United States in and for the Southern District of California.

Comes now the said D. G. Collins, the petitioner in the above-entitled matter, and makes answer to the return to the writ of habeas corpus, said return having been heretofore filed therein by William I. Traeger, the Sheriff of the County of Los Angeles, State of California, to wit:

I.

Alleges that the original writ of habeas corpus issued herein on the 17th day of April, 1928, out of and under the seal of the said United States District Court, was delivered by this petitioner to the United States Marshal of said Southern District of California, with instructions to serve the original writ upon said Sheriff and make return on a copy thereof. That thereupon this petitioner delivered to the United States Marshal aforesaid, the said original writ of habeas corpus and a true and correct copy of the same, upon which copy the return of service was to be made by the said United States Marshal. That whether or not the said original writ of habeas corpus was served by the said United States Marshal is immaterial herein, in view of the fact that said return has been made and filed in said

matter to said original writ of habeas corpus, and no motion has been made or presented to said United States District Court to quash the service of the writ.

II.

The said petitioner in further answer to said return avers that if no copy of the petition for said writ has been served upon the said Sheriff, it was an inadvertence of no consequence, in that said return has been made and no motion presented by the said Sheriff to quash said writ, nor the [20] service of the writ, because of any omission to serve a copy of said petition. That your petitioner has served upon the attorney herein for said Sheriff a true and correct copy of said petition for said writ of habeas corpus. That your petitioner is informed and believes and therefore alleges the fact to be that prior to making said return to said writ, the attorney for said sheriff had knowledge of the contents of the original petition on file herein. Petitioner denies that the said sheriff imprisons or detains in custody the said Millard under the warrant of arrest issued by a Judge of the Municipal Court of Los Angeles and alleges that the said sheriff detains said Millard in his custody under and by virtue of the warrant of rendition of the Governor of the state of California.

III.

Avers that no hearing upon the merits of the case was at any time had by the Governor of the State of California. That an informal hearing, but not upon the merits of the case, was had be-

fore the Executive Secretary of the said Governor. That certain legal objections were stated to said Executive Secretary against the issuance of a warrant of extradition, and in overruling the same, he stated that he did so in order that the courts might pass upon the objections.

IV.

In further answer to said return to said writ of habeas corpus, the said petitioner denies that a prior writ of habeas corpus has been obtained by him or ordered by the Superior Court of the State of California, in and for the County of Los Angeles or by any other court, and based upon a petition alleging the same or substantially the same facts or grounds for issuing such writ as those which are set forth in the petition on file herein, in the office of the clerk of the said United States District Court, and in that behalf the petitioner avers the fact to be that the petition for the said writ of habeas corpus, in said Superior Court and the writ issued thereon have no reference or relation whatever to the custody or imprisonment of the said S. S. Millard, by the said sheriff of said County of Los Angeles but on the contrary have reference entirely to another and [21] entirely different custody and an entirely different restraint of liberty, not involved in the petition filed herein in said United States District Court, nor involved in the writ of habeas corpus issued by said Court. That on the said 17th day of April, 1921, the said Superior Court, upon motion of this petitioner, dismissed the said petition on file therein, but without

prejudice, after petitioner had stated to said Superior Court that the imprisonment and the restraint of the liberty of said S. S. Mallard was *then* altogether different from that stated in said petition on file in said Superior Court, and in the writ of habeas corpus theretofore issued in that court, and that such custody had since the granting of such writ, been transferred to the Sheriff of said county. That at the time of the filing of the petition for a writ of habeas corpus in the said United States District Court, there was not and never had been prior thereto any application or petition for a writ of habeas corpus in any court respecting the imprisonment and detention in custody of the said S. S. Mallard, by said Sheriff, and for that reason no reference was made in the petition filed in said United States District Court to any prior writ of habeas corpus, nor to any prior petition for a writ of habeas corpus, in said Superior Court, nor is there any rule of the said United States District Court requiring in a petition for a writ of habeas corpus any reference to a prior petition for, or writ of habeas corpus in said Superior Court or in any State Court where the latter petition and writ have no relation to the same custody and imprisonment specified in the petition filed in said United States District Court.

V.

That said petitioner avers that no warrant for the arrest of the said S. S. Mallard (also known as Elid Stanitch) nor for the arrest of the said Elid Stanitch, was ever issued by a Judge of the Mu-

nicipal Court of the City of Chicago, for the County of Cook, State of Illinois. That the only warrant of arrest issued against the said S. S. Millard (also known as Elid Stanitch) is the one appearing in the extradition or rendition papers [22] and issued by the Clerk of the Municipal Court of the said City of Chicago. That there is no "offense" now pending or that ever was pending before a Judge of the said Municipal Court of the City of Chicago, as contradistinguished from the said Municipal Court, nor before that court.

VI.

That the petitioner herein is informed and believes, and upon his information and belief alleges, that there is no such offense or crime in the said State of Illinois as that known or designated, "the crime of confidence game" irrespective of whether any money or property had been obtained thereby. That for this reason the petitioner avers that the designation of the crime in the rendition or extradition warrant issued by the Governor of the State of California on the 11th day of April, 1928, and a copy of which warrant is annexed to said return to wit, the designation of the crime as being that of "confidence game," irrespective of whether any money or property was obtained thereby, is not a designation or specification of any crime known to the laws of the State of Illinois.

VII.

The petitioner avers that the restraint of the liberty of said S. S. Millard and the imprisonment of the said S. S. Millard by the said Sheriff of the

said County of Los Angeles, State of California, alleged and referred to in said return of said Sheriff on file herein, are in violation of Section 2 of Article IV of the Constitution of the United States, and of the due process of law clause in the Fourteenth Amendment of the said Constitution, and in violation of Section 5278 of Revised Statutes of United States, in the following respects, viz.:

(1) That the accusation, affidavit and complaint upon which said extradition or rendition warrant of the Governor of California is based does not charge the said S. S. Millard or Elid Stanitch with treason, felony or other crime. That as the petitioner is informed and verily believes, the said accusation, affidavit and complaint are not on file in said Municipal Court and were not on file therein at the time the said warrant of extradition was issued by the Governor of [23] *of* California, nor at the time the requisition was made by the Governor of Illinois, and that the original of said accusation, affidavit and complaint are not now in said State of Illinois, but are in the said State of California, as the petitioner is informed and verily believes and therefore alleges is the fact.

(2) The petitioner avers upon his information and belief, and therefore alleges the fact to be that the said S. S. Millard, also known as Elid Stanitch, did not flee from justice in the said State of Illinois, nor take refuge in said State of California, and is not a fugitive from justice.

(3) That the charge made against the said S. S. Millard or Elid Stanitch, in the said accusation,

affidavit and complaint is therein specified to be based on Section 98, of Paragraph 256, Chapter 38 of the Revised Statutes of Illinois. That said Section 98 is in violation of the Fourteenth Amendment of the Constitution of the United States, in that in omitting to define the crime, it attempts to create, and in omitting to specify the essential elements of the crime, it operates to deprive the accused of his liberty without due process of law, and denies him the equal protection of the laws,

(4) That the said extradition or rendition proceedings have been instituted in bad faith and in fraud and perversion of the law, pertaining thereto, in the particulars alleged in the petition on file herein, and for the reasons in said petition stated.

(5) That a Judge of the Municipal Court in the City of Chicago is not a magistrate as required by Section 5278 of the Revised Statutes of the United States, in that by section 50c, paragraph 442 of Chapter 37 of the Illinois Revised Statutes all proceedings in a criminal case in said Municipal Court in the City of Chicago are expressly required to be "proceedings in Court instead of proceeding before a Judge thereof" and so far as the petitioner is informed, there is no statute or other law in Illinois constituting a Judge of the Municipal Court of Chicago, a magistrate. That by section 2, Paragraph 390, subdivision VI of Chapter 37 of the Illinois Revised [24] Statutes, the said Municipal Court in Chicago, as a Court and not a judge of said court has jurisdiction of all proceedings for the arrest, examination, committment and bail of

persons charged with criminal offenses, and no Judge thereof has authority as such to receive or file accusations of crime, nor to issue a warrant of arrest.

(6) The said complaint, affidavit and accusation are also void because the same do not conform to the requirements of section 2, paragraph 687, Chapter 38, of the Revised Statutes of Illinois, in that neither said affidavit, complaint or accusation contains a statement of the offense charged, nor statement that the complainant has just and reasonable grounds to believe that the accused committed the offense. The petitioner avers that said extradition or rendition proceedings are not based on an indictment and as he is informed and believes, no indictment has ever been found or filed against the said S. S. Millard.

VIII.

That for the reasons and upon the grounds in this answer stated, and for the reasons and upon the grounds stated in the petition on file herein, the said warrant of extradition or rendition issued by the Governor of the State of California, is absolutely void, and in violation of section 2, of Article IV of the Constitution of the United States, and in violation of the Fourteenth Amendment of said Constitution, and in violation of section 5278 of the Revised Statutes of the United States.

IX.

That the warrant of arrest issued by W. S. Baird, Judge of the Municipal Court of the City of Los Angeles, a copy of which is annexed to said return,

is void on the face of it, for the following reasons, viz.:

(1) That the same does not specify any crime known to the laws of the State of Illinois.

(2) That according to the law of the State of Illinois, no Judge of the Municipal Court of Chicago, as such Judge, is a magistrate in the said State of Illinois. [25]

(3) That no "offense" is now pending or ever was pending before a Judge of said Municipal Court of the City of Chicago.

(4) That no warrant was duly or regularly, or at all, issued by any magistrate of the said State of Illinois, for the arrest or apprehension of the said S. S. Millard, or Elid Stanitch, nor placed in the hands of a proper or other *office* for service.

X.

WHEREFORE, the petitioner G. D. Collins, prays that the said imprisonment and restraint of the liberty of the said S. S. Mallard, by the said Sheriff of the County of Los Angeles, State of California, be by the said United States District Court, adjudged to be unlawful and in violation of the Constitution and laws of the United States, in the particulars hereinbefore specified, and that therefore, the said S. S. Millard, be by said Court ordered discharged from said imprisonment and restored to his liberty.

G. D. COLLINS,
Petitioner *in pro. per.*

United States of America,
Southern District of California,
County of Los Angeles,—ss.

G. D. Collins, being duly sworn, deposes and says: That he is the petitioner herein; that he has read the foregoing answer and knows the contents thereof; that the same is true of his own knowledge except as to the matters therein stated upon his information or belief; that as to those matters he believes it to be true.

G. D. COLLINS.

Subscribed and sworn to before me this 21st day of April, 1928.

[Seal] ANNA MAY KELLY,
Notary Public in and for the County of Los Angeles, State of California.

My commission expires October 15, 1931.

[Endorsed]: No. 9094–J.—Cr. In the District Court of the United States, in and for the Southern District of California. In the Matter [26] of the Petition of G. D. Collins, in Behalf of S. S. Millard for a Writ of Habeas Corpus. Answer of Petitioner G. D. Collins to Return to Writ of Habeas Corpus. Filed Apr. 21, 1928. R. S. Zimmerman, Clerk. By Murray E. Wire, Deputy Clerk. [27]

[Title of Court and Cause.]

BILL OF EXCEPTIONS.

I.

BE IT REMEMBERED, that heretofore, to wit, on the 25th day of April, 1928, the above-entitled matter came on regularly before said court for hearing upon the petition for the writ of habeas corpus and on the writ of habeas corpus and on the return thereto and the answer to the return, all of which were previously and are now on file herein. That at the hearing the petitioner appeared *in propria personam* and the prisoner S. S. Millard was represented by his counsel, Isador Morris, Esq. The respondent William I. Traeger, the sheriff of the County of Los Angeles, State of California, was represented at the hearing by Asa Keyes, Esq., the district attorney of said County of Los Angeles, and by Tracy Chatfield Becker, Esq., deputy district attorney. That thereupon the said petition, writ of habeas corpus, return and answer to the return were submitted to the court and the respondent produced before the Court the original warrant of rendition issued by the Governor of California on the 11th day of April, 1928, a copy of which is attached to said return, and the said original warrant of rendition was then read in evidence before the Court.

That it appeared to the Court that a copy of the said petition was served on respondent prior to the hearing and that at the filing herein of said

petition, no application for the writ of habeas corpus had been made in, nor had any such writ issued out of any State court respecting the custody or imprisonment of said Millard by said sheriff. That there was offered in evidence by respondent and received in evidence by the Court the following papers, viz.: [28]

State of California,

Governor's Office,
Sacramento.

(Cut of
The Great Seal of
The State of California.)
C. C. YOUNG,
Governor.

I, C. C. Young, Governor of the State of California, do hereby certify that I have carefully compared the transcript, to which this certificate is attached, with the record on file in my office of which it purports to be a copy, and that the same is a full, true and correct copy thereof.

IN WITNESS WHEREOF, I have hereunto set my hand and have caused the Great Seal of the State of California to be affixed hereto this 10th day of April, 1928.

C. C. YOUNG,
Governor.

[Impression Seal]

Attest: FRANK C. JORDAN,
Secretary of State.
By ROBERT V. JORDAN,
Deputy. [29]

STATE OF ILLINOIS.

EXECUTIVE DEPARTMENT.

The Governor of the State of Illinois, to the Governor of State of California.

WHEREAS, It appears by the papers required by the statutes of the United States which are hereunto annexed, and which I certify to be authentic and duly authenticated in accordance with the laws of this State, that Elid Stanitch, *alias* S. S. Millard, stands charged with the crime of confidence game, which I certify to be a crime under the Laws of this State, committed in the County of Cook in this State, and it having been represented to me that he has fled from the justice of this State and has taken refuge in the State of California,

NOW, THEREFORE, pursuant to the provisions of the Constitution and the laws of the United States in such case made and provided, I do hereby require that the said Elid Stanitch, *alias* S. S. Millard, be apprehended and delivered to Robert E. Calkins, who is hereby authorized to receive and convey HIM to the State of Illinois, there to be dealt with according to law.

IN WITNESS WHEREOF, I have hereunto set my hand and caused to be affixed the Great Seal

of State, at the Capitol in the City of Springfield, this 4th day of April, A. D. 1928.

[Impression Seal.] LEN SMALL.

[Seal of the State of Illinois, Aug. 26th, 1919.]

By the Governor:

LOUIS L. EMMERSON,
Secretary of State. [30]

(49954–2M)

To His Excellency, LEN SMALL, Governor of Illinois:

Your petitioner, State's Attorney for the County of Cook, State of Illinois, would represent unto your Excellency that Elid Stanitch, *alias* S. S. Millard, stands charged by the accompanying certified copy of Complaint, Warrant and Affidavit on file Municipal Court, Chicago, Ills., with the crime of confidence game committed in the County of Cook and State of Illinois, on or about the 4th day of November, 1927.

That on or about the 4th day of November, 1927, the said Elid Stanitch, *alias* S. S. Millard, fled from the State of Illinois, and is now, as your petitioner verily believes, in the County of Los Angeles and State of California, fugitive from the justice of this State, and the grounds of such belief are as follows: Telegram received from James E. Davis, Chief of Police at Los Angeles, California, stating the said Elid Stanitch, *alias* S. S. Millard, is in custody there.

WHEREFORE, your petitioner prays that a requisition may issue upon the Governor of the said State of California and that Robert E. Calkins,

of the city of Chicago, County of Cook and State of Illinois, may be appointed messenger of the State of Illinois, to go after, receive and return the said fugitive to the County of Cook, State of Illinois, for trial. Who is a fit and proper person and who has no personal interest in the outcome of the case.

Your petitioner further certifies that in his opinion the ends of public justice require that the said Elid Stanitch, *alias* S. S. Millard, be brought to this State for trial at the public expense, that he believes he has sufficient evidence to secure his or her conviction.

ROBERT E. CROWE,
States Attorney for Cook County, Chicago, Illinois.

I, Leon E. Goetz, first being duly sworn, do solemnly declare [31] that the facts set forth in the foregoing petition are true, and that a requisition for the above-named fugitive is not sought for the purpose of collecting a debt, to allow any person to travel at the expense of the State, or to answer any private end whatever, and shall not be used for any of said objects.

LEON E. GOETZ.

Subscribed and sworn to before me this 27th day of March, 1928.

[Seal] _____,
Judge of the Municipal Court, Chicago, Illinois.
JOHN O. SBARBARO.

N. B.—Requisitions will not be issued on petitions alone. The petition must, in all cases, be accompanied by a certified copy of an indictment

found against the fugitive, or, in the absence of an indictment, a certified copy of a complaint made before and on file in the office of a magistrate, charging the fugitive with a crime. The petition and all other papers presented in connection with an application for a requisition must be in duplicate. The Secretary of State's fees, $2.00, for issuing requisition, should accompany the petition.

I, I. L. Weaver, Acting County Judge of Cook County, State of Illinois, do hereby certify that the ends of justice require the return of Elid Stanitch, *alias* S. S. Millard.

I. L. WEAVER,
Acting County Judge.

[Endorsed]: "Petition for Requisition upon the Governor of ———.

———————————, Messenger."

"The Secretary of State will issue a requisition in this case.

———————————,
Governor."

N. B.—Do not fill out this part of the petition, but leave blank for Secretary of State. [32]

The Municipal Court of Chicago.

MCC37r.

In the Municipal Court of Chicago.

COMPLAINT FOR EXAMINATION.

State of Illinois,
City of Chicago,—ss.

Leon E. Goetz, of 810 So. Wabash Ave. *Street,*

Chicago, Ill., complains to Hon. Matthew D. Hartigan, one of the Judges of The Municipal Court of Chicago, and being duly sworn and examined, on his oath, states that Elid Stanitch, *alias* S. S. Millard, did on the 4th day of November, A. D. 1927, at the City of Chicago, County of Cook, in the State aforesaid, feloniously and fraudulently obtain from the U. S. Health Films, Inc., a corporation, then and there existing and organized under the laws of the State of Illinois, the sum of Twenty-five Thousand Dollars ($25,000.00), in lawful money of the United States of America, the personal goods, money, and property of the said corporation by means and by use of the confidence game, with the felonious intent to then and there cheat and defraud the said corporation in violation of Section 98, Par. 256, Ch. 38, R. S., contrary to the statute in such case made and provided, and against the peace and dignity of the People of the State of Illinois.

LEON E. GOETZ.

This complainant further states that the said Elid Stanitch, *alias* S. S. Millard, committed such offense.

WHEREFORE, the said Leon E. Goetz prays a warrant may issue against the said Elid Stanitch, *alias* S. S. Millard, according to law.

LEON E. GOETZ. [33]

Subscribed and sworn to before me this 23d day of March, A. D. 1928.

MATTHEW D. HARTIGAN,
Judge of The Municipal Court of Chicago.

I have examined the within complaint and the

complainant and am satisfied there is probable cause for filing the same. Leave is hereby granted to file it, and it is ordered that a warrant issue against the accused.

Bail fixed at $25,000.00 or cash deposit of $———

MATTHEW D. HARTIGAN,
Judge of The Municipal Court of Chicago.

370 25 M 2–27.

[Endorsed]: "No. 239403.
"The Municipal Court.
"The People of the State of Illinois vs. ———
"Complaint for Examination.
"Witnesses: ———." [34]

The Municipal Court of Chicago.
MCC376.

State of Illinois,
City of Chicago,—ss.
In the Municipal Court of Chicago.

THE PEOPLE OF THE STATE OF ILLINOIS
vs.
ELID STANITCH, *alias* S. S. MILLARD.

WARRANT FOR EXAMINATION.

The People of the State of Illinois to the Bailiff of The Municipal Court of Chicago, and to All Sheriffs, Coroners and Constables Within the State, and to All Police Officers of Chicago—GREETING:

WHEREAS, Leon E. Goetz has this day made complaint, under oath, before Hon. Matthew D.

Hartigan, one of the Judges of The Municipal Court of Chicago, which complaint has been filed with the undersigned Clerk of said court, and the Court having this day examined, under oath, said complainant and read the complaint filed herein, and it appearing to the Court that the offense of Confidence Game has been committed in the City of Chicago, in the State aforesaid, contrary to the form of the statute in such case made and provided, and the Court having found that there is probable cause for believing that Elid Stanitch, *alias* S. S. Millard, guilty of said offense, and the Court having ordered that a warrant issue out of this court for the arrest of said Elid Stanitch, *alias* S. S. Millard.

WE THEREFORE COMMAND YOU, forthwith to take the person of said Elid Stanitch, *alias* S. S. Millard, and him safely keep, so that you may have his body instanter before the Municipal Court of Chicago, in Branch 27 at 625 S. Clark Street, to answer to the People of the State of Illinois for and concerning said crime and to be dealt with according to law, and have you then and there this writ with an endorsement thereon as to the manner in which you may execute the same. [35]

WITNESS: JAMES A. KEARNS, Clerk of our said Court and the seal thereof, at Chicago, aforesaid, this 23d day of March, A. D. 1928.

[Seal] JAMES A. KEARNS,
Clerk of The Municipal Court of Chicago.

15M 6–26 11829.

[Endorsed]: "No. 239403.

"The Municipal Court.

"The People of the State of Illinois vs. Elid Stanitch, *alias* S. S. Millard.

"See complainant.

"Warrant for examination.

"Executed this writ by arresting within named ——— and bringing ——— body into court this ——— day of —— 192——.

"The within named ——— after diligent search was not found ———, 192——.

Service $———.

"————————————,

Bailiff.

"————————————,

"Police Officer and *Ex-officio* Bailiff.

"——— Precinct.

"Bail $25,000.00.

"Cash deposit of $———.

"Leon E. Goetz, 810 S. Wabash Ave., U. S. Health Films Co. Harrison 4006. [36]

Municipal Court.

MCC225½.

State of Illinois,
City of Chicago,—ss.

AUTHENTICATION FOR EXTRADITION.

I, James A. Kearns, Clerk of the Municipal Court of Chicago, the same being a court of record in said city and state, do hereby certify the above and foregoing to be true, perfect and complete copies, respectively, of a complaint sworn to before

the Honorable Matthew D. Hartigan, one of the Judges of The Municipal Court of Chicago, and now on file in my office, and a warrant issued by me pursuant to the order of said court in a certain cause now pending in said court in which the People of the State of Illinois are Plaintiffs and Elid Stanitch, *alias* S. S. Millard, is defendant. And I further certify that said Matthew D. Hartigan was on the day said complaint and warrant bear date, and now is, one of the duly elected, commissioned and qualified Judges of said court and authorized by law to administer oaths, and that as such full faith and credit are due to all his official acts as such in all courts of record and elsewhere.

WITNESS my hand and the seal of said court, this twenty-seventh day of March, A. D. 1928.

[Seal] JEANNE M. WALLACE,
Clerk of the Municipal Court of Chicago.

UNITED STATES OF AMERICA.

State of Illinois,
City of Chicago,—ss.

I, Harry Olson, Chief Justice of The Municipal Court of Chicago, in said city and state do hereby certify that James A. Kearns, whose name is subscribed to the above certificate of [37] attestation, now is, and was at the time of signing and sealing the same, the Clerk of The Municipal Court of Chicago and Keeper of the Record and Seal thereof, duly elected and qualified to office; that full faith and credit are due all his official acts as such in all courts of record in the United States

and elsewhere; and, further, that his attestation is in due form of law and by the proper officer.

GIVEN under my hand at my Chambers in Chicago, this twenty-seventh day of March, A. D. 1928.

HARRY OLSON, (Seal)
Chief Justice of The Municipal Court of Chicago.

State of Illinois,
City of Chicago,—ss.

I, James A. Kearns, Clerk of The Municipal Court of Chicago, in said city and state, do hereby certify that the Honorable Harry Olson, whose name is subscribed to the above certificate of attestation, now is, and was at the time of signing and sealing the same, Chief Justice of The Municipal Court of Chicago, and was duly elected, commissioned and qualified to office; that full faith and credit are due all his official acts as such in all courts of record in the United States and elsewhere; and that his attestation is in due form of law and by the proper officer.

GIVEN under my hand and the seal of said court, at Chicago, this twenty-seventh day of March, A. D. 1928.

[Seal] JEANNE M. WALLACE,
Clerk of The Municipal Court of Chicago.

3M 11–25 11392. [38]

State of Illinois,
County of Cook,—ss.

In the Municipal Court of Chicago.

Confidence Game.

PEOPLE OF THE STATE OF ILLINOIS

vs.

ELID STANITCH, *alias* S. S. MILLARD.

AFFIDAVIT OF LEON E. GOETZ, IN AID OF THE EXTRADITION OF ELID STANITCH, *alias* S. S. MILLARD, DEFENDANT AND FUGITIVE FROM JUSTICE.

Leon E. Goetz, being first duly sworn, upon oath deposes and says that he is a resident of the City of Chicago, County of Cook, and State of Illinois, and that he is General Manager for U. S. Health Films, Inc., a corporation; that on the 4th day of November, A. D. 1927, at the City of Chicago, County of Cook, and State of Illinois, the said Elid Stanitch, *alias* S. S. Millard, defendant and fugitive from justice, did unlawfully, willfully and feloniously obtain from the U. S. Health Films, Inc., a corporation, the sum of twenty-five thousand dollars ($25,000), lawful money of the United States of America, the personal property of the U. S. Health Films, Inc., a corporation, by means and use of the confidence game, with intent to cheat and defraud—contrary to the statute in such case made and provided and against the peace and dignity of the

People of the State of Illinois, all of which will more fully appear from the complaint and warrant now on file in the Municipal Court of Chicago, copies of which are hereto attached and made a part hereof.

Affiant further says that he knows of his own personal knowledge that the said Elid Stanitch, *alias* S. S. Millard, defendant and fugitive from justice, was personally and physically present in the City of Chicago, County of Cook, and State of Illinois, on the 4th day of November, A. D. 1927, and that shortly thereafter he left the jurisdiction of the City of Chicago, County of Cook, and State of Illinois, and is now in Los Angeles, California, as affiant is informed from a telegram received by Michael Hughes, [39] Commissioner of Police at Chicago, Illinois, stating that the said Elid Stanitch, *alias* S. S. Millard, is in custody there.

Affiant further says that this prosecution is not brought for the purpose of collecting any debt, nor to enable anyone to ride free at the expense of the state, but is *bona fide* in every respect, and that when the said Elid Stanitch, *alias* S. S. Millard, defendant and fugitive from justice, is returned to the jurisdiction of the City of Chicago, County of Cook, and State of Illinois, affiant will appear in the Municipal Court of Chicago, Illinois, and prosecute him to the fullest extent of the law.

LEON E. GOETZ.

Subscribed and sworn to before me this 27th day of March, A. D. 1928.

[Seal] JOHN O. SBARBARO,
Judge of the Municipal Court of Chicago, Illinois.

[40]

State of Illinois,
County of Cook,—ss.

In the Municipal Court of Chicago.

Confidence Game, etc.

THE PEOPLE OF THE STATE OF ILLINOIS

vs.

ELID STANITCH, *alias* S. S. MILLARD.

THE STATUTES UPON WHICH IS BASED THE COMPLAINT IN THIS CASE ARE AS FOLLOWS:

Sec. 98. Every person who shall obtain or attempt to obtain from any other person or persons any money, property or credit by means or by use of any false or bogus check or by any other means, instrument or device commonly called the confidence game shall be imprisoned in the penitentiary not less than one year nor more than ten years.

Sec. 99. In every indictment under the preceding section, it shall be deemed and held a sufficient description of the offense to charge the accused did, on, etc., unlawfully and feloniously obtain, or attempt to obtain (as the case may be) from A B (here insert the name of the person defrauded or attempted to be defrauded,) his money (or prop-

erty, in case it be not money,) be means and by use of the confidence game.

[Impression Seal] ROBERT E. CROWE,
State's Attorney of Cook County Illinois.

Revised Statutes of the State of Illinois, 1919, Criminal Code, Chap. 38, Sec. 98 and 99, page 1009. [41]

STATE OF ILLINOIS.

EXECUTIVE DEPARTMENT.

The Governor of the State of Illinois to All to Whom These Presents Shall Come, GREETING:

KNOW YE, That I have authorized and empowered and by these Presents do authorize and empower

ROBERT E. CALKINS

as messenger and agent on the part of this State to take and receive from the proper authorities of

STATE OF CALIFORNIA

ELID STANITCH, *alias* S. S. MILLARD

A

fugitive from justice, and convey HIM to the State of Illinois, there to be dealt with according to Law.

IN WITNESS WHEREOF, I have hereunto set my hand and caused to be affixed the Great Seal of State, at the Capitol in the City of Springfield, this 4th day of April, A. D. 1928.

[Seal of the State of Illinois—Aug. 26th, *1818.*]

LEN SMALL.

By the Governor:

LOUIS L. EMMERSON,
Secretary of State. [42]

STATE OF ———,

EXECUTIVE DEPARTMENT.

I, ———, Governor of ———, do hereby certify that I have this ——— day of ———, 192—, honored the requisition of the Governor of the State of Illinois for the surrender of ———, fugitive from justice of said last-named State, and have issued a warrant for ——— delivery to ———, the agent of said State of Illinois, whose authority to receive said fugitive is annexed hereto.

IN WITNESS WHEREOF, I have hereunto set my hand and caused to be affixed the ——— seal of —— at the Capitol in ——— this ——— day of ———, 192—.

———————————,
Governor.

State of Illinois,
County of ———,—ss.

I hereby certify that I have executed the within writ, by going after, receiving, and returning said fugitive and delivering —h— to the sheriff of ——— County this —— day of ———, A. D. 192—.

———————————,
Messenger.

(40526–2M–10–25) 7 [43]

REQUISITION
OF
THE GOVERNOR OF ILLINOIS
For

Charged With

Received ———, 192——.
Warrant Issued ———, 192——.
(40528—2M–10–25) 7
(Impression Seal)
Note: Impression Seal of each page prior to this page in Bill of Exceptions. [44]

TESTIMONY OF S. S. MILLARD, IN HIS OWN BEHALF.

WHEREUPON the prisoner S. S. MILLARD, also known as Elid Stanitch, was sworn as a witness in his own behalf. He was then asked the following questions by his counsel, namely:

Q. Mr. Millard, you are the party named in the habeas corpus proceedings before the Court? To which question the witness answered in the affirmative.

Q. Did you on or about the 4th day of November, 1927, obtain from the U. S. Health Films, Incorporated, an Illinois corporation, the sum of $25,000?

Mr. BECKER.—I object to that on the ground it is not a question that can be litigated in this

proceeding or put in issue; that the rendition warrant of the Governor of the State of California which has already been offered in evidence here by the petitioner himself, and also set up in the return and referred to in the petition, foreclosed any such inquiry; that it is presumed that the magistrate who issued the warrant acted advisably and on probable cause. The papers are all certified to as authentic by the Governor and that question is not open to inquiry here in this proceeding.

The COURT.—(Addressing Mr. Morris, the Counsel for the Prisoner.) For your record perhaps you had better state what you propose to show by the witness, so the record may be clear as to what is to follow.

Mr. MORRIS.—I propose to show by this witness the transaction upon which this warrant is based is purely and simply a civil matter.

The COURT.—It is well that you now make your complete offer so we may have the offer. Let the record show specifically what you expect to prove.

Mr. MORRIS.—We offer to prove, if the Court please, that the accused, S. S. Millard, is not a fugitive from justice and in that behalf to show by sufficient evidence that on the 4th day of November, 1927, he obtained by means of a perfectly legitimate business transaction with the U. S. Health Films, Inc., an Illinois corporation, and as a loan by the corporation to him the sum of twenty-five thousand dollars, for which he executed

his two certain promissory notes not yet matured, one in the sum of fifteen [45] thousand dollars and one in the sum of ten thousand dollars, fully secured by transfer to the corporation of property exceeding in value the amount loaned him. We propose to show that it is this perfectly legitimate business transaction, that is wrongly, maliciously and wantonly and for the purpose solely of private revenge made the exclusive and only basis of the charge, the altogether false charge on which these extradition or more accurately these interstate rendition proceedings are based, in fraud and perversion of the Constitution and laws of the United States. We propose further to prove that the very matters connected with the making of the loan and the written contracts out of which the transaction was had between the parties, and the loan itself are involved in a suit in equity brought by Millard as plaintiff against the U. S. Health Films, Inc., in the United States District Court, Northern District of Illinois, Eastern Division, being case No. 8000 in that court and still pending there awaiting trial in due course and we will prove if permitted, that this suit was brought long prior to the accusation which is made the basis of these interstate rendition proceedings. We will show that according to the decisions of the Supreme Court of Illinois and particularly in the cases of People vs. Santow, 293 Ill. 430, People vs. Kratz, 311 Ill. 118, and People vs. Heinsius, 319 Ill. 168, 170, that the transaction in and by

which Millard obtained the loan of twenty-five thousand dollars, was and is a perfectly legitimate business transaction, no confidence game nor the obtaining of money by the use or means of what is commonly known as a confidence game. On the facts stated and which we here offer to prove in this habeas corpus case we will thereby show to this Court that Millard is not a fugitive from justice. That we have the legal right to prove the facts stated for this purpose, we cite to the Court the following authorities: Matter of Strauss, 197 U. S. 324, 332, 333; Pettibone vs. Nichols, 203 U. S. 192; McNichols vs. Pease, 207 U. S. 110; Ex parte Slauson, 73 Fed. 666; Tennessee vs. Jackson, 36 Fed. 258; In re Cannon, 47 Mich. 481, 486, 487; Ex parte Owens, 245 Pac. 68. [46]

Our purpose is not to bring to trial in this habeas corpus case any issue or question *or* guilt or innocence but to show that no such issue and no such question is possible and that the accusation itself is false and fraudulent, that it is without reasonable or probable cause and is in fraud and perversion of the Constitution and laws of the United States relative to interstate rendition and that the accused is not a fugitive from justice.

"By Mr. Becker, Counsel for Respondent Sheriff. It is understood, I believe, by this offer,—to make it perfectly clear on the record—that the petitioner is not offering to testify or prove that he was not actually in the State of Illinois at the times charged in the complaint and warrant involved in this proceeding, but simply because, as he did not commit

any offense and therefore he is not a fugitive. Am I correct?

By Mr. MORRIS, Counsel for Petitioner.—Yes.

By Mr. BECKER.—I renew my objections to the offer on the same grounds heretofore stated. It is not a permissible subject for inquiry in this proceeding. That matter must be tried out in the State courts of Illinois after the petitioner is brought there to answer. It is not a subject to inquiry here."

Mr. Becker, Counsel for Respondent, also offered in evidence, and the Court received in evidence, Section 389 of Chapter 37 of the Criminal Code of the State of Illinois which reads as follows:

> "There shall be established in and for the City of Chicago, a Municipal Court, which shall be a court of record and shall be styled a Municipal Court of Chicago";

also Section 390 of said Chapter 37 of said Code, which reads as follows:

> "The Municipal Court shall have jurisdiction in the following cases: * * * cases to be designated and hereinafter referred to as cases of the sixth class, which shall include (b) all proceedings for the arrest, examination, committment and bail, or persons charged with criminal offenses,"

also Section 442 of said Chapter 37 of said Code, which reads as follows: [47]

> "The Practise and all proceedings in the

Municipal Court for the arrest, examination, committment and bail, of persons charged with criminal offenses shall be the same as near as may be as provided by law for similar proceedings before justices of courts of record and justices of the peace, with the following exceptions:

1. The complaint shall be filed with the Clerk of the Municipal Court, who, when ordered by the court, shall issue a warrant, etc.";

also Section 686 of Chapter 38 of said Code, which reads as follows:

"For the apprehension of persons charged with offenses except such as are cognizable exclusively by justices of the peace, any judge of a court of record in vacation as well as in term time, or any justice of the peace is authorized to issue process, etc."

The COURT.—I will sustain the objection. To which ruling the petitioner and the said S. S. Millard then and there duly excepted.

That there was no evidence offered, introduced or received, or showing made in the case other than that herein stated.

Whereupon the case was argued on its merits and after argument, it was submitted to the Court for its decision, order and judgment, which the Court then rendered and entered, on the merits of the case, discharging the writ of habeas corpus and remanding the said S. S. Millard to the custody of the said sheriff, upon said rendition warrant, to which decision, order and judgment the

petitioner and the said S. S. Millard then and there duly excepted.

II.

The foregoing bill of exceptions is hereby settled and allowed and certified to be correct this 23 day of May, 1928.

WM. P. JAMES,
United States District Judge. [48]

IT IS HEREBY AGREED AND STIPULATED by and between Isador Morris, Attorney for S. S. Millard, and Tracy Chatfield Becker, Esq., Deputy District Attorney of Los Angeles County, State of California, in behalf of the District Attorney of said County, Counsel for the respondent, William I. Traeger, the Sheriff of the County of Los Angeles, State of California, that the foregoing bill of exceptions be settled and allowed and certified to be correct by the Honorable William P. James, Judge of the District Court of the United States of America, in and for the Southern District of California.

Dated at Los Angeles, California, this 23d day of May, 1928.

ISADOR MORRIS,
Attorney for S. S. Millard.
A. S. KEYES,
District Attorney of Los Angeles County, California.
TRACY C. BECKER,
Deputy District Attorney of Los Angeles County, California,
Attys. for Respondent, William I. Traeger.

[Endorsed]: No. 9094–J.—Cr. In the District Court of the United States in and for the Southern District of California. In the Matter of the Petition of G. D. Collins for the Writ of Habeas Corpus in Behalf of S. S. Millard. Bill of Exceptions. Filed May 23, 1928. R. S. Zimmerman, Clerk. By B. B. Hansen, Deputy Clerk. [49]

At a stated term to wit, the January Term, A. D. 1928, of the District Court of the United States of America, within and for the Southern Division of the Southern District of California, held at the courtroom thereof, in the City of Los Angeles, on Wednesday, the 25th day of April, in the year of our Lord one thousand nine hundred and twenty-eight. Present: The Honorable WM. P. JAMES, District Judge.

[Title of Court and Cause.]

MINUTES OF COURT—APRIL 25, 1928—HEARING.

This matter coming on for hearing on return of writ; G. D. Collins, petitioner, being present; S. S. Millard being present, and Isadore Morris, Esq., appearing as his attorney; Tracy C. Becker, Deputy District Attorney of Los Angeles County, appearing as counsel for the respondent; and Ray E. Woodhouse, being present as official stenographic reporter of the testimony and the proceedings; respective counsel state that they are ready to pro-

ceed, and it is by the Court ordered that the hearing be proceeded with;

G. D. Collins reads original warrant of rendition, in open court, copy of which is attached to and is a part of return filed by respondent, whereupon,

Elid Stanich, also known as S. S. Millard, is called and sworn and testifies on direct examination conducted by Isadore Morris, Esq., his attorney, and said attorney makes offer of proof, and an objection by the respondent is sustained thereto, and an exception is allowed to this ruling, and thereupon,

G. D. Collins argues on matters arising from the face of the warrant of rendition; and Tracy C. Becker, Esq., offers; and there is admitted in evidence, without objection, a certified copy of extradition proceedings, certified by the Secretary of the State of California, and the same is marked Respondent's Exhibit No. 1; and G. D. Collins, Esq., argues further, citing authorities, whereupon further argument is made by Attorney Becker, who cites authorities in support thereof, and [50]

Petitioner and respondent submit this matter at this time for ruling of the Court, and

At the hour of 11:30 o'clock A. M., the Court instructs the Clerk that order be entered, at the hour of 4 o'clock P. M. discharging writ of habeas corpus, and remanding S. S. Millard into the custody from which he came, and that the record may show that an exception is allowed to this ruling.

Now, at the hour of 4 o'clock P. M., it is by the Court ordered that writ of habeas corpus herein is

discharged, and Elid Stanich, also known as S. S. Millard, is remanded into the custody from which he came, and an exception is allowed to the making of this order. [51]

[Title of Court and Cause.]

NOTICE OF APPEAL.

To the Said William I. Traeger, as Sheriff of the County of Los Angeles, State of California, Appellee:

Notice is hereby given you that in the above-entitled matter the therein named G. D. Collins and S. S. Millard do hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the final order, decision and judgment of the said United States District Court in and for the Southern District of California, made and entered in the said matter on the 25th day of April, 1928, and that the certified transcript of record will be filed in said Appellate Court within thirty days from the filing of this notice.

You are further notified that said appeal operates as a supersedeas and prevents you from transferring or removing or surrendering the custody of the said S. S. Millard until after the final decision of the case on the appeal. (Judicial Code U. S., sec. 465; Revised Stat. U. S., sec. 766; Act of Feb. 13, 1925, c. 229, sec. 6, 43 Stat. 936, 940; Rule 33 of United States Circuit Court of Appeals, Ninth Circuit.)

A copy of the assignment of errors on said appeal is herewith served upon you.

Respectfully,
G. D. COLLINS,
Petitioner *in pro. per.*

Dated April 25th, 1928, at Los Angeles, California.

ISADOR MORRIS,
Attorney for Said S. S. Millard.

[Endorsed]: No. 9094–J.—Cr. In the District Court of the United [52] States in and for the Southern District of California. In the Matter of the Petition of G. D. Collins for the Writ of Habeas Corpus in Behalf of S. S. Millard. G. D. Collins and S. S. Millard, Appellants, vs. William I. Traeger, as Sheriff of the County of Los Angeles, State of California, Appellee. Notice of Appeal. Filed Apr. 25, 1928. R. S. Zimmerman, Clerk. By B. B. Hansen, Deputy Clerk. [53]

[Title of Court and Cause.]

AFFIDAVIT OF SERVICE OF NOTICE OF APPEAL AND OF ASSIGNMENT OF ERRORS AND OF CITATION.

State of California,
County of Los Angeles,—ss.

Isador Morris, being duly sworn, deposes and says that he is attorney herein for the appellant, S. S. Millard; that on the 25th day of April, 1928,

in the city of Los Angeles, County of Los Angeles, State of California, he served the notice of appeal in the above-entitled cause upon Asa Keyes, Esq., the District Attorney of said County of Los Angeles, attorney herein for William I. Traeger, Sheriff of Los Angeles County, the appellee in said cause, by then and there delivering to and leaving with Forrest E. Murray, Esq., Deputy District Attorney, and during the absence of said District Attorney from his office in said City of Los Angeles a true and correct copy of said notice of appeal and of the assignment of errors on file herein. That on said 25th day of April, 1928, at said City of Los Angeles, affiant also served upon William I. Traeger, Esq., the sheriff of said County of Los Angeles, a copy of said notice of appeal and a copy of the said assignment of errors and a copy of the citation on file herein by delivering to and leaving with Eugene Biscailuz, the under-sheriff, said copies of said papers, the said William I. Traeger being absent from his office at said time.

ISADOR MORRIS.

Subscribed and sworn to before me this 26th day of April, 1928.

[Seal] L. A. BLOOM,

Notary Public in and for the County of Los Angeles, State of California. [54]

[Endorsed]: No. 9094–J.—Cr. In the District Court of the United States, in and for the Southern District of California. In the Matter of the Petition of G. D. Collins for the Writ of Habeas Corpus

in Behalf of S. S. Millard. G. D. Collins and S. S. Millard, Appellants, vs. William I. Traeger, as Sheriff of the County of Los Angeles, State of California, Appellee. Affidavit of Service of Notice of Appeal and of Assignment of Errors and of Citation. Filed Apr. 26, 1928. R. S. Zimmerman, Clerk. By B. B. Hansen, Deputy Clerk. [55]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

Afterwards, to wit, on the 25th day of April, 1928, in this same term, before the Honorable Judges of United States Circuit Court of Appeals for the Ninth Circuit, come the said G. D. Collins, petitioner, *in propria personam,* and the said S. S. Millard, appellants in the above-entitled matter and cause, and say there is manifest error in the record and proceedings therein, in this, to wit:

I.

That the said United States District Court in and for the Southern District of California erred in its decision, refusing to discharge the said S. S. Millard from the custody and imprisonment alleged in the petition for the writ of habeas corpus on file in said court in said matter above-entitled and numbered 9094–J.—Cr. therein.

II.

That the said United States District Court erred in its decision that the said S. S. Millard is not illegally imprisoned and is not unlawfully restrained

of his liberty in violation of section 2 of Article IV of the Constitution of the United States.

III.

That the said United States District Court erred in its decision that the said S. S. Millard is not illegally imprisoned nor unlawfully restrained of his liberty in violation of the "due process of law" clause in the Fourteenth Amendment of the [56] Constitution of the United States.

IV.

That the said United States District Court erred in deciding the case adversely to the said petitioner and the said Millard.

V.

That the said United States District Court erred in deciding that the said S. S. Millard is not illegally imprisoned and is not unlawfully restrained of his liberty in violation of section 5278 of the Revised Statutes of the United States.

VI.

That the said United States District Court erred in remanding the said S. S. Millard to the custody designated in the final order made and entered by said Court on said writ of habeas corpus, and in not ordering that the said Millard be discharged from custody and restored to his liberty.

VII.

That the said United States District Court erred in its ruling excluding the petitioner from prosecuting said habeas corpus proceedings to final judgment in said court and in preventing him from

doing so *in propria personam* as the petitioner therein.

VIII.

That the said United States District Court erred in its ruling excluding the said petitioner from supporting the averments of his answer to the return to the writ of habeas corpus by proof.

IX.

That the said United States District Court erred in its ruling denying the motion of said petitioner based upon the petition, return, and answer to the return, on file herein, for judgment discharging said Millard from the custody and imprisonment alleged in said petition and return and restoring said Millard to his liberty.

X.

That the said United States District Court erred in its ruling excluding proof and evidence offered by said Millard to show that the rendition proceedings are in violation of the [57] Constitution and laws of the United States relative to interstate rendition and that said proceedings are not *bona fide* and that said Millard is not a fugitive from justice.

XI.

Whereas, by the law of the land, the said S. S. Millard should have been ordered discharged by said United States District Court from the custody and imprisonment alleged in the said petition for the writ of habeas corpus, and by the Court order restored to his liberty.

XII.

WHEREFORE, the said appellants, the said

G. D. Collins and S. S. Millard pray that the said final order, decision and judgment of the said United States District Court in and for the Southern District of California be reversed with direction to discharge the said Millard from said custody and imprisonment and restore him to his liberty. That the said appellants be granted such other and further relief as may be just and in conformity with law.

Dated this 25th day of April, 1928, at the city of Los Angeles, County of Los Angeles, State of California.

G. D. COLLINS,
Appellant *in pro. per.*
ISADOR MORRIS,
Attorney for Appellant S. S. Millard.

[Endorsed]: In the United States Circuit Court of Appeals for the Ninth Circuit. In the Matter of the Petition of G. D. Collins for the Writ of Habeas Corpus in Behalf of S. S. Millard. No. 9094–J.—Cr. United States District Court, Southern District of California. G. D. Collins and S. S. Millard, Appellants, vs. William I. Traeger, as Sheriff of the County of Los Angeles State of California, Appellee. Assignment of Errors. Filed Apr. 25, 1928. R. S. Zimmerman, Clerk. By B. B. Hansen, Deputy Clerk. [58]

[Title of Court and Cause.]

BOND FOR COSTS ON APPEAL.

WHEREAS, heretofore, to wit, on the 25th day of April, 1928, the above-named G. D. Collins and S. S. Millard filed in said United States District Court in and for the Southern District of California and in the Clerk's office of said court their notice of appeal and served the same on the appellee William I. Traeger as Sheriff of the County of Los Angeles, State of California,—

NOW, THEREFORE, we the undersigned sureties, residents and householders in said county of Los Angeles, do hereby jointly and severally promise, agree and undertake to and with the said appellee in the penal sum of two hundred and fifty dollars, that the said appellants will prosecute their appeal to effect and if they fail to make their plea good, shall answer all costs.

IN WITNESS WHEREOF we have hereunto set our hands and seals this 11th day of May, 1928.

NELLIE L. WALSH. (Seal)
M. S. McENIRY. (Seal)

[59]

United States of America,
Southern District of California,
County of Los Angeles,—ss.

Nellie L. Walsh and M. S. McEniry, being duly sworn, each for himself deposes and says that he is one of the sureties whose name is subscribed to the foregoing bond and undertaking; that he is a

householder in and resident of said county of Los Angeles; that he is worth the sum of two hundred and fifty dollars over and above all his debts and liabilities exclusive of property exempt from execution.

NELLIE L. WALSH.
M. S. McENIRY.

Subscribed and sworn to before me this 11th day of May, 1928.

[Seal] HENRY W. SHAW,
Notary Public in and for the County of Los Angeles, State of California.

The foregoing bond is hereby approved this 11 day of May, 1928.

WM. P. JAMES,
United States District Judge.

[Endorsed]: No. 9094–J.—Cr. In the District Court of the United States in and for the Southern District of California. In the Matter of the Petition of G. D. Collins for the Writ of Habeas Corpus in Behalf of S. S. Millard. G. D. Collins and S. S. Millard, Appellants, vs. William I. Traeger, as sheriff of the County of Los Angeles, State of California, Appellee. Bond for Costs on Appeal. Filed May 11, 1928. R. S. Zimmerman, Clerk. By B. B. Hansen, Deputy Clerk. [60]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD ON APPEAL.

To the Clerk of Said Court:

Sir: Please issue transcript on appeal in above-entitled matter, consisting of petition for writ of habeas corpus, order granting writ, the writ of habeas corpus, return to writ, answer to return and bill of exceptions, also order and judgment remanding prisoner, also notice of appeal and affidavit of service, also assignment of errors, also citation, also clerk's certificate to record.

Respectfully,
G. D. COLLINS,
Petitioner *in pro. per.*
ISADOR MORRIS,
Attorney for Said Millard.

Dated April 25, 1928.

[Endorsed]: No. 9094–J—Cr. U. S. District Court, Southern District of California. In Re Matter of the Petition of G. D. Collins for the Writ of Habeas Corpus in Behalf of S. S. Millard. Praecipe for Record on Appeal. Filed Apr. 25, 1928. R. S. Zimmerman, Clerk. By B. B. Hansen, Deputy Clerk. [61]

CITATION.

United States of America,—ss.

To William I Traeger, the Sheriff of the County of Los Angeles, State of California, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, on the 25th day of May, A. D. 1928, pursuant to an appeal filed in the Clerk's office of the District Court of the United States, in and for the Southern District of California, in that certain habeas corpus case in said District Court of the United States and numbered 9094–J.—Cr. therein, and wherein S. S. Millard, also known as and called Elid Stanich, is appellant and wherein G. D. Collins is also appellant and you are the appellee as said sheriff and hold in your official custody as sheriff the said S. S. Millard, or Elid Stanich, and you are hereby required to show cause, if any there be, why the final order and judgment of the United States District Court in and for the Southern District of California in the said matter mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf. It is further ordered that your said custody of the said S. S. Millard be not disturbed pending said appeal unless said Millard be released on bail as provided in Rule 33 of the said United States Circuit Court of Appeals for the Ninth Circuit.

WITNESS, the Honorable WILLIAM P. JAMES, United States District Judge for the Southern District of California; this 25th day of April, A. D. 1928, and of the Independence of the United States, the one hundred and fifty-second.

WM. P. JAMES,

U. S. District Judge for the Southern District of California. [62]

[Endorsed]: Filed Apr. 25, 1928.

[Title of Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO RECORD ON APPEAL.

I, R. S. Zimmerman, Clerk of the United States District Court for the Southern District of California, do hereby certify the foregoing volume containing 61 pages, numbered from 1 to 61, inclusive, to be a full, true and correct typewritten copy of the complaint and petition for the writ of habeas corpus, order granting writ, writ of habeas corpus, return to writ of habeas corpus, answer of petitioner to return to writ of habeas corpus, bill of exceptions, minute order and judgment remanding, notice of appeal, affidavit of service of notice of appeal, assignment of errors, bond for costs of appeal, praecipe for transcript of record on appeal, and the original citation; and that the same together constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I DO FURTHER CERTIFY that the fees of the Clerk for preparing, correcting and certifying the foregoing record on appeal amount to $23.00, and that said amount has been paid me by the appellant herein.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the District Court of the United States of America, in and for the Southern District of California, Southern Division, this 14th day of June, in the year of our Lord one thousand nine hundred and twenty-eight and of our Independence the one hunderd and fifty-second.

[Seal] R. S. ZIMMERMAN,
Clerk of the District Court of the United States of America, in and for the Southern District of California. [63]

[Endorsed]: No. 5485. United States Circuit Court of Appeals for the Ninth Circuit. G. D. Collins and S. S. Millard, Appellants, vs. William I. Traeger, as Sheriff of the County of Los Angeles, State of California, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Southern District of California, Southern Division.

Filed June 25, 1928.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 5485

In the

United States

Circuit Court of Appeals

For the Ninth Circuit.

S. S. MILLARD, et al.,

Appellants,

vs.

WILLIAM I. TRAEGER as Sheriff of Los Angeles County, State of California,

Appellee.

BRIEF FOR APPELLANTS.

GEORGE D. COLLINS, JR.,
506 Claus Spreckels Bldg.,
703 Market Street, San Francisco
Counsel for Appellants.

Parker Printing Company, 523 Clay Street, San Francisco

Subject Index

List of Authorities Cited.

Table of Statutes.

No. 5485

In the

United States

Circuit Court of Appeals

For the Ninth Circuit.

S. S. MILLARD, et al.,
Appellants,

vs.

WILLIAM I. TRAEGER as Sheriff of Los Angeles County, State of California,
Appellee.

BRIEF FOR APPELLANTS.

I.

STATEMENT OF CASE.

This is an appeal from the final order and judgment of the United States District Court, Southern District of California, Hon. William P. James, judge presiding, discharging a writ of habeas corpus theretofore granted and issued by the court and remanding the appellant Millard to the custody of the appellee, the

sheriff of the County of Los Angeles, State of California, *upon a warrant of rendition* issued by the governor of California on demand and requisition of the governor of Illinois. The date of the judgment is April 25th, 1928 (R. 53). The appeal was taken the same day and after entry of the judgment (R. 55, 56). That the remand is solely upon this warrant of rendition is expressly stated in the record on the appeal (R. 51). The remand therefore was not upon process issuing out of the Municipal Court of Los Angeles County, under the state fugitive law so called, to wit: sections 1548 et seq., Penal Code of California. Any such process of the state court would undoubtedly be superseded by the warrant of rendition. It is true there was process issued by the Municipal Court, but that court discharged it on motion of the accused. The record shows that the writ of habeas corpus was granted by the District Court, on the verified complaint and petition of the appellant Collins, it being alleged in the petition that it is presented to the court in behalf of the prisoner Millard, with his consent and at his request and that the reason he did not make or verify it is that he was unable to do so because of his imprisonment and that

> "the necessary delay in an attempt to have him do so might entail his possible removal beyond the jurisdiction of the court before he could sign and verify the petition" (R. 2).

In other words he would be smuggled out of the jurisdiction and upon the warrant of rendition, a by

no means infrequent occurrence in such cases, and threatened in this one. In any event the District Court considered the showing in the application for the writ of habeas corpus to be sufficient in this particular and granted the writ (R. 6). Nor was any objection made or question raised before the court by the appellee that the showing in the respect stated was inadequate (R. 11, 12, 51). Of course no such objection can be made for the first time on the appeal. (*McCarthy v. Arndstein,* 43 Sup. Ct. 562, 563, 564, and 46 Sup. Ct. 16.) The record states that the case on the writ of habeas corpus issued by the court was heard and determined *on its merits* (R. 51). However and as shown in another part of this brief the appellant Collins had the legal right to make and present the petition and prosecute it to judgment.

II.

RECORD AND QUESTIONS ON WHICH APPEAL PRESENTED.

This appeal is presented upon a duly authenticated record consisting of: (1) the petition for the writ of habeas corpus; (2) the order granting the writ; (3) the writ of habeas corpus; (4) the return to the writ; (5) the answer to the return; (6) the order and judgment discharging the writ and remanding appellant Millard to the custody of the appellee; (7) a bill of exceptions duly allowed, settled, certified, signed and filed; (8) a notice of appeal and assignment of errors; (9) the specification of errors set

forth in this brief; (10) the points, authorities and argument in this brief. The appellant Millard has been released on bail in the sum of ten thousand dollars, pending the appeal.

As shown by the petition for the writ of habeas corpus and the evidence (R. 2, 17, 29, 51), the appellant Millard was held in custody by the appellee as sheriff of the county of Los Angeles under and by authority of a certain interstate rendition warrant issued by the governor of California on the requisition of the governor of Illinois, based upon an *affidavit of complaint* entitled in the Municipal Court of Chicago, and alleging that the appellant Millard

> "did on the 4th day of November, A. D. 1927, at the City of Chicago, County of Cook, in the state aforesaid, feloniously and fraudulently obtain from the U. S. Health Films, Inc., a corporation then and there existing and organized under the laws of the State of Illinois, the sum of twenty-five thousand dollars in lawful money of the United States of America, the personal goods, money, and property of the said corporation by means and by use of the confidence game, with the felonious intent to then and there cheat and defraud the said corporation in violation of Section 98, par. 256, ch. 38 R. S. contrary to the statute in such cases made and provided and against the peace and dignity of the People of the State of Illinois."

This affidavit purports to be made and sworn to before one of the judges of the Municipal Court of Chicago, who however is denied by the statute creating the court, all authority to issue a warrant of arrest

and who therefore is not a magistrate such as required by section 5278 of the Revised Statutes of the United States, (25 *Corpus Juris,* 264). The petition for the writ of habeas corpus presents the following strictly and distinctively Federal questions:

1. That the accusatory affidavit on which the rendition proceedings are based, does not charge the said Millard with treason, felony or other crime as required by section 2 of article IV of the Constitution of the United States and by Section 5278 of the Revised Statutes of the United States.

2. That the accusatory affidavit was not on file in any court at the time of the issuance of the warrant of rendition nor subsequent thereto.

3. That the said Millard did not flee from justice in the State of Illinois nor take refuge in the State of California and is not a fugitive from justice and committed no crime in Illinois.

4. That there is no affidavit *made before a magistrate of Illinois,* charging said Millard with having committed treason, felony or other crime.

5. That the rendition proceedings have been instituted in bad faith and in perversion of the Constitution and laws of the United States and without probable cause and also in fraud and in violation of the jurisdiction of the United States District Court, Northern District of Illinois, Eastern Division in a certain suit in equity there pending, wherein said Millard is plaintiff and the said U. S. Health Films, Inc., is defendant.

6. That the accusatory affidavit and the charge therein made are false, fraudulent and without probable cause.

7. That the imprisonment of said Millard by the appellee is in violation of section 2 of article IV of the Constitution of the United States and of the "due process of law" clause in the Fourteenth Amendment of the Constitution and in violation of section 5278 of the Revised Statutes of the United States.

The *answer to the return to the writ of habeas corpus,* presents all these Federal questions (R. 19), and in addition avers that there is no such crime known to the laws of Illinois as that of "confidence game"; that the accusatory affidavit is based upon section 98, paragraph 230, chapter 38 of the Revised Statutes of Illinois and that said section 98 is in violation of the Fourteenth Amendment of the Constitution of the United States

> "in that in omitting to define the crime it attempts to create and in omitting to specify the essential elements of the crime, it operates to deprive the accused of his liberty without due process of law and denies him the equal protection of the laws";

that the accusatory affidavit is void on its face in not conforming to the requirements of section 2, paragraph 687, chapter 38 of the Revised Statutes of Illinois, in that it contains no statement of the offense charged nor any statement that the affiant has just and reasonable grounds to believe that the accused com-

mitted the offense, as expressly required by the statute; that the *warrant of rendition* issued by the governor of California is void on the face of it and in violation of section 2 of article IV of the Constitution of the United States and in violation of the Fourteenth Amendment of the Constitution and in violation of section 5278 of the Revised Statutes of the United States.

It is shown by the bill of exceptions (R. 29), *inter alia,* (1) that the requisition and demand made by the governor of Illinois and all the papers on which said requisition and demand are based, were introduced in evidence by counsel for the *appellee;* (2) that the requisition and demand in specifying that Millard "stands charged with the crime of confidence game" shows on its face that he is not accused of any crime known to the laws of Illinois; (3) that the requisition and demand by the governor of Illinois do not certify that the *accusatory affidavit is authentic,* as required by section 5278 of the Revised Statutes of the United States; (4) that the papers on which the requisition and demand by the governor of Illinois are based, are not authenticated as required by the laws of the United States, or by the laws of the State of Illinois, or by the laws of the State of California; (5) that the said Millard offered to prove on the hearing of the habeas corpus case before the United States District Court, that he is not a fugitive from justice and in that behalf to show by sufficient evidence that on the 4th day of November 1927, the date stated in the accusatory

affidavit, he obtained by means of a perfectly legitimate business transaction with the U. S. Health Films, Inc., an Illinois corporation, also named in the affidavit, and as a loan by the corporation to him, the sum of twenty-five thousand dollars, for which he executed his two certain promissory notes, not yet matured, one in the sum of fifteen thousand dollars and one in the sum of ten thousand dollars, *fully secured by transfer to the corporation of property exceeding in value the amount loaned;* that it is this perfectly legitimate business transaction that is wrongly, maliciously and wantonly and for purpose solely of private revenge, made the exclusive and only basis of the charge, the altogether false and fraudulent charge on which these interstate rendition proceedings are based and so based in fraud and perversion of the Constitution and laws of the United States; that the very matters connected with the making of the loan and the written contract upon the basis of which the transaction was had between the parties, and the loan itself are involved in a suit in equity brought by Millard as plaintiff against the U. S. Health Films, Inc., in the United State District Court, Northern District of Illinois, Eastern Division, being case No. 8000 in that court and still pending there, awaiting trial in due course; that this suit was brought long prior to the accusation which is made the basis of these interstate rendition proceedings; that according to the decisions of the Supreme Court of Illinois and particularly in the cases of *People v. Santow,* 293 Ill. 430, *People v.*

Kratz, 311 Ill. 118 and *People v. Heinsius,* 319 Ill. 168, 170, the transaction in and by which Millard obtained the loan of twenty-five thousand dollars, was and is a perfectly legitimate business transaction, no confidence game, nor the obtaining of money by the use or means of what is commonly called or known as a confidence game; that on these facts

> "and which we here offer to prove in this habeas corpus case, we will thereby show to this court that Millard is not a fugitive from justice. That we have the legal right to prove the facts stated, for this purpose, we cite to the court the following authorities: *Matter of Strauss,* 197 U. S. 324, 332, 333; *Pettibone v. Nichols,* 203 U. S. 192; *McNichols v. Pease,* 207 U. S. 110; *Ex parte Slauson,* 73 Fed. 666; *Tennessee v. Jackson,* 36 Fed. 258; *In re Cannon,* 47 Mich. 481, 486, 487; *Ex parte Owens,* 245 Pac. 68. Our purpose is not to bring to trial in this habeas corpus case any issue or question of guilt or innocence, but to show that the accusation itself is false and fraudulent, that it is without reasonable or probable cause and is in fraud and perversion of the Constitution and laws of the United States relative to inter-state rendition and that the accused is not a fugitive from justice."

This offer of proof was objected to by counsel for appellee and the objection was sustained by the court, to which ruling exception was duly reserved by appellants, as shown in the bill of exceptions (R. 47, 51), which also affirmatively states that

> "there was no evidence offered, introduced or received, or showing made in the case other than that herein stated. Whereupon the case was argued on its merits and after argument it was

> submitted to the court for its decision, order and judgment, which the court then rendered and entered, on the merits of the case, discharging the writ of habeas corpus and remanding the said S. S. Millard to the custody of the said sheriff, upon said rendition warrant, to which decision, order and judgment the petitioner and the said S. S. Millard then and there duly excepted." (R. 51.)

The Federal questions in the case are presented by the petition for the writ of habeas corpus, by the return to the writ, by the answer to the return, by the order and judgment discharging the writ of habeas corpus and remanding Millard to the custody of the appellee as sheriff of the County of Los Angeles *upon the warrant of rendition,* and by a bill of exceptions (R. 1, 11, 19, 29, 51, 54). No opinion was filed by the District Court.

III.

SPECIFICATION OF ERRORS.

The appellants specify the following errors in the rulings, decision, order and judgment of the United States District Court, Southern District of California, in the case, viz.:

1. The court erred in deciding that the appellant Millard is not imprisoned and restrained of his liberty by the appellee as sheriff of Los Angeles county, in violation of the Constitution and laws of the United States, to wit: section 2 of article IV of the Consti-

tution, also section 1 of the Fourteenth Amendment of the Constitution and section 5278 of the Revised Statutes of the United States.

2. The court erred in deciding, ordering and adjudging that the writ of habeas corpus be discharged and the said Millard remanded to the custody of the appellee as sheriff of the County of Los Angeles, State of California, *upon the governor's warrant of rendition.*

3. The court erred in deciding and ruling that the warrant of rendition is not void on its face in omitting to state necessary jurisdictional facts.

4. The court erred in deciding and in ruling that the requisition and demand of the governor of Illinois upon the governor of California are not void on their face.

5. The court erred in deciding and in ruling that the said Millard is a fugitive from justice of the State of Illinois.

6. The court erred in deciding and in ruling that the accusatory affidavit on which the rendition proceedings are based, was made before a magistrate of the State of Illinois.

7. The court erred in deciding and in ruling that the accusatory affidavit states facts sufficient to constitute in law a crime against the State of Illinois.

8. The court erred in deciding and in ruling that section 98, paragraph 230, chapter 38 of the Revised Statutes of Illinois is not in violation of the Four-

teenth Amendment of the Constitution of the United States, in omitting to define the crime it attempts to create and in omitting to specify the essential elements of the crime and in thereby operating to deprive said Millard of his liberty without due process of law and in denying him the equal protection of the laws.

9. The court erred in deciding and ruling that the accusatory affidavit on which the rendition proceedings are based, is not void by reason of its omission to conform to the requirements of section 50c of paragraph 442 of chapter 37 and section 2 of paragraph 687, chapter 38 of the Revised Statutes of Illinois, in not containing a statement of the offense charged, nor any statement that the affiant has just and reasonable grounds to believe that the accused committed the offense.

10. The court erred in deciding that a "confidence game" in itself and irrespective of whether any money is obtained thereby, is a violation of a statute or law of Illinois.

11. The court erred in deciding and ruling that the requisition and demand of the governor of Illinois, certify that the accusatory affidavit on which the rendition proceedings are based, is authentic, as required by section 5278 of the Revised Statutes of the United States.

12. The court erred in deciding and ruling that the papers on which the requisition and demand by the governor of Illinois are based, are duly and properly authenticated.

13. The court erred in deciding and ruling against the offer to prove that said Millard is not a fugitive from justice of the State of Illinois.

14. The court erred in deciding and ruling against the offer to prove that said rendition proceedings are without reasonable or probable cause and a fraud upon the law and in fraudulent perversion of section 2 of Article IV of the Constitution of the United States and of section 5278 of the Revised Statutes of the United States.

15. The court erred in deciding and ruling against the offer to prove that the accusatory affidavit and the charge therein made are without reasonable or probable cause and a fraud upon the law.

16. The court erred in deciding and ruling against the offer to prove that the accusatory affidavit, the charge therein stated and the said rendition proceedings are maliciously and wantonly made and instituted, in violation and perversion of law.

17. The court erred in deciding and ruling against the offer to prove that no crime was committed by Millard in the State of Illinois.

18. The court erred in deciding and ruling against the offer to prove that the rendition proceedings are in fraud and in violation of the jurisdiction vested by the laws of the United States in the District Court of the United States, Northern District of Illinois, Eastern Division, in the suit there pending, wherein said Millard is plaintiff and the U. S. Health Films,

Inc., is defendant, and presenting for adjudication the very matters involved in said rendition proceedings and in said accusatory affidavit.

19. The court erred in deciding and ruling that the accusatory affidavit was filed in the Municipal Court of Chicago and that the accusation is pending therein.

20. The court erred in deciding and ruling that the Municipal Court of Chicago has jurisdiction of said accusatory affidavit and of the matters therein alleged.

21. The court erred in deciding and ruling that the matters alleged in said accusatory affidavit can be prosecuted thereby and need not be prosecuted by indictment under the laws of Illinois.

22. The court erred in rejecting evidence offered by the appellants that the accused S. S. Millard is not a fugitive from justice in that on November 4th, 1927, the date specified in the accusation, he obtained by means of a perfectly legitimate business transaction with the U. S. Health Films, Inc., an Illinois corporation, also named in said accusation, the sum of twenty-five thousand dollars as a loan, for which he executed his promissory notes, not yet matured, one in the sum of fifteen thousand dollars and the other in the sum of ten thousand dollars, the payment of which notes at maturity is fully secured by transfer to the corporation of property exceeding in value the amount loaned him; that it is this perfectly legitimate business transaction that is wrongfully, maliciously, wantonly and solely for purposes of private revenge made the exclusive and only basis of the charge, the

altogether false charge on which the rendition proceedings are based in fraud and perversion of the Constitution and laws of the United States; that the very matters connected with the making of the loan and the written contract on which the transaction was had between the parties and the loan itself are involved in a suit in equity brought by Millard as plaintiff against the U. S. Health Films, Inc., in the United States District Court for the Northern District of Illinois, Eastern Division, at issue and ready for trial in due course and that this suit was brought long prior to the accusation which is made the basis of these rendition proceedings; that in accordance with the decisions of the Supreme Court of Illinois and particularly in the cases of *People v. Santow,* 293 Ill. 43; *People v. Kratz,* 311 Ill. 110; *People v. Heinsius,* 319 Ill. 168, 170, the transaction in and by which Millard obtained the loan of twenty-five thousand dollars was and is a perfectly legitimate business transaction and not a confidence game and not obtaining money by use or means of a confidence game or by use or means of what is commonly known as a confidence game; that the purpose of this proffered evidence is not to bring to trial in this habeas corpus case any question or issue of Millard's guilt or innocence, but to show that no such question or issue is possible and that the accusation itself is false and fraudulent and without reasonable or probable cause and in fraud and perversion of the Constitution and laws of the United States and that therefore Millard is not a fugitive from justice of the State of Illinois.

The brief and oral argument for the appellee, utterly fail in every particular to answer any one of the many points urged by appellants.

IV.

BRIEF OF ARGUMENT.

THE JURISDICTION.

First as to the *jurisdiction* of both the United States District Court, Southern District of California, and the United States Circuit Court of Appeals for the Ninth Circuit.

It is undoubtedly the well settled law that upon the matters presented in the petition for the writ of habeas corpus, the United States District Court, Southern District of California, had competent jurisdiction to issue the writ and determine the case on its merits.

Judicial Code, sec. 453;
Rev. Stat. U. S., sec. 753;
Ex parte Graham, 216 Fed. 813;
Ex parte Birdseye, 244 Fed. 972;
Day v. Kim, 2 Fed. (2d) 966, 967.

This appeal was taken and perfected pursuant to the provisions of the Act of Congress approved January 31, 1928 (Chap. 14, Public, No. 10, 70th Congress, Sec. 1801), reading as follows:

> "That in all cases where an appeal may be taken as of right, it shall be taken by serving

> upon the adverse party or his attorney of record, and by filing in the office of the clerk with whom the order appealed from is entered, a written notice to the effect that the appellant appeals from the judgment or order or from a specified part thereof. No petition of appeal or allowance of an appeal shall be required; provided however that the review of judgments of state courts of last resort shall be petitioned for and allowed in the same form as now provided by law for writs of error to such courts."

This law had not been amended nor repealed when the appeal was taken and perfected, to wit: April 25th, 1928, the date the judgment and order were made and entered (R. 53, 55, 56). The appeal as a matter of right, to the United States Circuit Court of Appeals from the final order and judgment of the District Court, discharging the writ of habeas corpus and remanding appellant Millard to the custody of the sheriff upon the warrant of rendition, is granted by section 6 of the Act of Congress of February 13, 1925 (43 Stat. 940; Judicial Code, Sec. 463), known as the "Jurisdictional Act of 1925" the provision being as follows:

> "In a proceeding in habeas corpus in a district court or before a district judge, or a circuit judge, the final order shall be subject to review, on appeal, by the Circuit Court of Appeals of the circuit wherein the proceeding is had."

It results that the United States Circuit Court of Appeals for the Ninth Circuit has jurisdiction of the appeal in this case.

V.

THE RIGHT TO PETITION FOR HABEAS CORPUS IN BEHALF OF THE PRISONER.

While not a jurisdictional matter (*Genl. Inv. Co. v. N. Y. C. R. Co.,* 217 U. S. 228, 230, 231), and merely procedural, and not made the basis of any objection in the District Court, by the appellee, there cannot be the slightest doubt whatever but that as a matter of well settled law the appellant Collins had the legal right to make, verify and prosecute the petition for the writ of habeas corpus at the request of Millard and for the reasons in the petition stated (R. 2); and the District Court rightly so held in granting the writ (R. 6, 7).

It is said by a standard authority in stating the law upon the point:

> "The detention or imprisonment may sometimes be of such character that is is inconvenient or impossible for the person detained to make the application, and in any event it may be made by any person on his behalf. But it has been held that a third person may apply only at the request or with the consent of the person in whose behalf he assumes to act, and that a mere stranger has no standing to ask for the writ, though there are also cases holding that such request or consent is not necessary."
>
> 15 *Am. & Eng. Ency. Law,* 192, 193.

A similar statement of the law will be found in:

29 *Corpus Juris,* 137, 138, 139;

In re Ferrens, 3 Ben. 442, 445;

United States v. Watchorn, 164 Fed. 152, 153; *Ex parte Dostal,* 243 Fed. 668.

Section 460 of the Judicial Code (R. S. U. S. Sec. 761), clearly recognizes this to be the law by providing that either the *petitioner or the party imprisoned*

> "may deny any of the facts set forth in the return, or may allege any other facts that may be material in the case."

And rule 51 of the District Court provides in reference to applications for habeas corpus that

> "if the application is not made and verified by the party in custody, the person making such application shall verify the same in behalf of such party in custody, and shall set forth in said petition why it is not made and verified by the party in custody, and that he knows the facts set forth therein, or if upon information and belief, the sources of his information shall be stated. (R. S. 754.)"

This rule was strictly complied with in the instant case and the record shows it (R. 2, 6). And the District Court held the fact to be sufficiently shown by granting the writ (R. 6), heard the case on its merits and did not determine it on any objection to the legal sufficiency of the petition, nor remand the prisoner on any such plainly untenable ground or theory. Had the court done so, its decision would be reversed on appeal for this reason alone. But the appellee cannot for the first time raise on the appeal the objection that

the petition must be made by the prisoner and not in his behalf by another.

> *McCarthy v. Arndstein,* 43 Sup. Ct. 562, 563, 564; and 46 Sup. Ct. 16.

And this is undoubtedly the law. The right to petition carries with it the right to prosecute it to judgment. In *Washington, etc., Nav. Co. v. Balt., etc., S. Co.,* 263 U. S. 629, 635, the law is so stated.

VI.

NO FAILURE TO COMPLY WITH RULE 51 OF THE DISTRICT COURT, IN PETITION FILED.

Rule 51 of the District Court provides also that

> "if a previous application for a writ of habeas corpus has been made *in the same matter,* to any other court, that fact shall be set forth in the petition and the action of said court upon said petition shall be set forth therein."

The record shows that a previous petition for habeas corpus *and not in the same matter,* but upon an entirely different imprisonment, had been made by Millard and dismissed *without prejudice,* on his motion in the state superior court (R. 21, 22, 29, 30), the proceeding never having been heard or determined on its merits. And in the bill of exceptions in the record here, the District Court expressly states that at the time of the filing of the petition in the latter court,

> "no application for the writ of habeas corpus had been made in, nor had any such writ issued

out of any state court respecting the custody or imprisonment of said Millard by said sheriff." (R. 29, 30.)

The District Court accordingly ignored the objection of the appellee and heard and determined the case on its merits. In no event would the objection be jurisdictional or anything more than a procedural one and entirely without a semblance of fact to justify or sustain it. Clearly the District Court did right in disregarding it.

VII.

WARRANT OF RENDITION VOID ON ITS FACE, BECAUSE OF OMISSION TO STATE ESSENTIAL JURISDICTIONAL FACTS.

We insistently urged before the District Court, but unsuccessfully, that the warrant of rendition issued by the governor of California, and under which process the appellee as sheriff held the appellant Millard in custody, is void on its face and therefore the custody illegal because of the omission in the warrant of necessary jurisdictional facts (R. 54). Of course it will be conceded on all sides that the warrant of rendition is the sole and only authority and process the law gives the sheriff for the custody of appellant Millard and it is for this reason that the District Court remanded him to the custody of the sheriff, *upon the warrant of rendition* as constituting the necessary process (R. 51). It being the well settled law that there can be no other process or authority for the sheriff's custody of Millard, it results that the

warrant as necessary process and authority to the sheriff cannot be supplemented or corrected or cured in its jurisdictional defects by any other paper or papers in the rendition proceedings, for they are not process and can have no extra-territorial force as process to the sheriff, nor confer upon him the slightest authority to hold the appellant Millard in custody. All of which is self-evident. It results that no recourse can be had to any of the other papers to supply jurisdictional defects on the face of the rendition warrant and such is undoubtedly the well settled law on the point. It is solely by virtue of the governor's warrant of rendition, that the appellee as sheriff has authority to hold Millard in custody and if the warrant be void by reason of jurisdictional defects appearing on the face of it, the custody is illegal because in violation of section 5278 of the Revised Statutes of the United States and the prisoner is therefore entitled to his discharge on habeas corpus.

Now, in the first place, it is the well settled law that a governor's warrant of rendition is void on its face, if it omits to state the essential jurisdictional facts.

Compton v. Alabama, 214 U. S. 1, 6;
Ex parte Hagan, 295 Mo. 435, 443 to 450;
Com. v. Fay, 126 Mass. 237;
State v. Chase, 107 So. Rep. 541, 542, 543;
Ex parte Brannigan, 19 Cal. 136, 137;
Matter of Leddy, 11 Mich. 197;

Howard v. Gosset, 10 Q. B. 353, 452;
2 *Moore on Extradition,* secs. 622 and 625;
Scott on Interstate Rendition, 156, 157.

One of the jurisdictional facts on which the authority to issue a warrant of rendition is made conditional by section 5278 of the Revised Statutes of the United States is that where the proceedings are based upon

> "an affidavit made before a magistrate of any state or territory, charging the person demanded with having committed treason, felony or other crime, certified as authentic by the governor or chief magistrate of the state or territory from whence the person so charged has fled,"

the fact that the affidavit was made *before a magistrate* of the demanding state or territory being essential to the existence of the power of the governor of the state or territory to issue the warrant of rendition, must be stated or recited *in the warrant* or else the process is void on its face, and being void furnishes no authority for the arrest or detention of the accused. The very point that the rendition warrant is void on its face if it omits to state that the accusatory affidavit was made before a magistrate of the demanding state, is distinctly sustained by the authorities last above cited and there is nothing to the contrary in *Glass v. Becker,* 25 F. (2d) 929, for the point was not there raised or decided. No case is authority upon a given point unless the specific point is both raised and decided.

Boyd v. Alabama, 94 U. S. 645, 648;
Dewey v. Des Moines, 173 U. S. 193, 200;

Webster v. Fall, 266 U. S. 507, 511;
United States v. Mitchell, 271 U. S. 9, 14.

It is insufficient that the point was in the record in the case before the court and could have been raised if it was not. Say the Supreme Court:

> "Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents."
>
> *Webster v. Fall,* 266 U. S. 507, 511.

Manifestly it was never the purpose of the court in *Glass v. Becker,* 25 F. (2d) 929, to rule at variance with the conclusive point we urge against the rendition warrant, nor to decide in conflict with the authorities sustaining it, especially as the court makes no reference to any of the authorities on the subject; nor are any of the points we present on this appeal, even remotely suggested in the petition for a rehearing, filed in the case.

We contend on principle and authority that the governor's warrant of rendition under which the appellee as sheriff held the appellant Millard in custody is fatally defective on its face *in omitting to state the jurisdictional fact that the accusatory affidavit was made before a magistrate of Illinois.* Manifestly this point presents no question or objection that the person before whom the affidavit was made, is not a magistrate, but assuming for the purpose of the point the fact that the affidavit was made before a magistrate of Illinois,

we contend that this being confessedly a *jurisdictional fact,* the well settled law requires it to be stated in the rendition warrant, that the accusatory affidavit was made before a magistrate of Illinois, this being expressly required as an essential condition precedent to interstate rendition, by section 5278 of the Revised Statutes of the United States, in cases where there is no indictment, such as the instant one. We do not contend that the accusatory affidavit must be copied into the warrant, but our point is that the warrant must state that the affidavit was made before a magistrate of Illinois, or use some equivalent statement of this jurisdictional fact. Now all that the warrant of rendition states in the instant case upon the point is as follows:

> "And whereas the said representation and demand is accompanied by a copy of complaint, warrant of arrest, certificate of judge and clerk, *affidavit* certified by the governor of the state of Illinois, to be authentic, whereby the said Elid Stanitch, alias S. S. Millard is charged with said crime," etc.,

but there is absolutely nothing in the warrant to show the jurisdictional fact that the complaint or affidavit was made before a magistrate of Illinois. Therefore the warrant is void on its face. The fact that the governor of Illinois is stated in the rendition warrant to have certified that the affidavit is *authentic,* is no statement that it was made before a magistrate, for section 5278 of the Revised Statutes of the United States requires not only that the gov-

ernor of the demanding state certify that the affidavit is authentic, but also that the affidavit be one that has been made before a magistrate. It is therefore stated to be the law that certifying the affidavit to be authentic and so reciting in the rendition warrant, is not a statement nor the equivalent of a statement that the affidavit was made before a magistrate.

Ex parte Hagan, 295 Mo. 435, 443 to 450;
State v. Chase, 107 So. Rep. 541, 542, 543;
2 *Moore on Extradition,* secs. 622 and 625;
Scott on Interstate Rendition, 156, 157.

Manifestly an accusatory affidavit, *not made before a magistrate* can also be correctly and truthfully certified by the governor of the demanding state, to be *authentic,* so that it is clear such a certificate does not necessarily imply nor in the slightest degree import that the affidavit is one that was made before a magistrate. There is no decision to the contrary.

VIII.

NO CRIME SPECIFIED IN WARRANT.

It is also a jurisdictional fact the law requires to be sufficiently stated on the face of the rendition warrant and essential to its validity as process, the crime for which the rendition is granted and it must when *and as thus specified in the warrant,* be a crime under the laws of the demanding state. In the rendition warrant in the instant case the crime specified is

simply that of "confidence game," which in itself is no crime under the laws of the state of Illinois. It is only where money or property or credit is obtained by means of the game that there is a crime. In such cases the "confidence game" *is not the crime*, but only one of the elements necessary under the Illinois statute to constitute the crime. The statute is as follows:

> "Every person who shall obtain or attempt to obtain from any other person or persons, any money, property or credit by means or by use of any false or bogus check or by any other means, instrument or device commonly called the confidence game shall be imprisoned in the penitentiary not less than one year nor more than ten years."
>
> R. S. Ill., sec. 98, par. 230, Ch. 38.

In quoting from the Revised Statutes of Illinois in this brief, we have used Cahill's edition of 1927.

The Federal Court will take judicial notice of the statutes of Illinois. It is so held in:

Hogan v. O'Neil, 255 U. S. 52, 55.

Clearly the warrant of rendition specifies no crime known to the laws of Illinois. To convict a man of "confidence game" would not be a conviction of crime; therefore to state as do both the requisition and the warrant of rendition in the instant case that the appellant Millard is charged with the crime of "confidence game," when there is no such crime, is to render the process void. We again point out that a

"confidence game" is not criminal under the laws of Illinois unless it be what is "commonly called" the confidence game, and unless by means of it, money, property or credit is obtained, in which case the confidence game is but one of the elements of the crime defined by the statute. *The confidence game is not itself the crime.* Had the requisition or demand by the governor of Illinois and the warrant of rendition issued by the governor of California, stated that Millard stands charged with the crime of *obtaining money by means of what is commonly called the confidence game,* it would have been sufficient; but merely to state that he is charged with the crime of "confidence game" and without any statement that he obtained money, property or credit by means of the game, is no designation of a crime known to the laws of Illinois. So far as we have been able to ascertain, no state makes criminal a confidence game merely, but also requires that some one be defrauded of money, property or credit by means of the game.

IX.

WARRANT CANNOT BE AIDED OR SUPPLEMENTED BY OTHER PAPERS.

We have already pointed out in this brief, that if the warrant of rendition is void on its face for any reason, the illegality cannot be remedied by any other paper or papers in the rendition proceedings, nor by

the accusatory affidavit. This is clearly the law on principle and authority.

Ex parte Hagan, 295 Mo. 435, 445;
State v. Chase, 107 So. Rep. 541;
Com. v. Fay, 126 Mass. 237;
Howard v. Gosset, 10 Q. B. 353, 452;
Ex parte Brannigan, 19 Cal. 136, 137;
Matter of Leddy, 11 Mich 197.

Manifestly and as held by the Supreme Court of the United States, the only authority the law sanctions for the arrest and custody of the accused in the state upon which the demand is made, Is THE GOVERNOR'S WARRANT OF RENDITION, (*Compton v. Alabama,* 214 U. S. 1, 6), and therefore if for any reason it be void on its face, the person arrested and detained under it will be discharged on habeas corpus, and this is the well settled law as shown by the authorities we have cited, even though the other papers in the rendition proceedings do not contain or repeat the fatal defects existing in the warrant, but on the contrary *prove the warrant defective.* The record (p. 17) shows in the return made by the appellee as sheriff, to the writ of habeas corpus, that his arrest and custody of the appellant Millard is by virtue of the governor's warrant of rendition. It could not possibly be by any other authority or process in the rendition proceedings. Therefore if the warrant is void on its face the imprisonment is in violation of section 2 of article IV of the Constitution of the United States and of section 5278 of the Revised Statutes of the United States.

The bill of exceptions shows that the District Court remanded Millard to the custody of the appellee *upon the warrant of rendition.* (R. 51). The appellee has also annexed to his return a warrant, the so called fugitive warrant of the Municipal Court of Los Angeles County, but as this warrant has been discharged by the court that issued it, and in any event is superseded by the governor's warrant of rendition, there is no occasion for us to now point out the fatal defects existing in it as process.

X.

RENDITION WARRANT ALSO VOID BECAUSE COPY OF ACCUSATORY AFFIDAVIT NOT CERTIFIED BY GOVERNOR OF ILLINOIS TO BE AUTHENTIC.

Section 5278 of the Revised Statutes of the United States expressly requires that the accusatory affidavit be not only made before a magistrate of the demanding state, but that the governor of the latter *certify the copy to be authentic.* There is no such certificate in the instant case, specifically addressed to the accusatory affidavit, (R. 31), and therefore the warrant of rendition is void because issued in violation of the requirements of section 5278 of the Revised Statutes of the United States. At the hearing on the merits of the habeas corpus case in the District Court, the *appellee* offered and the court received in evidence (R. 30), a certified copy of the papers on which the governor of California issued the warrant of rendition,

but the certificate is by the governor of California (R. 30), and not by the governor of Illinois. One of these papers thus offered and received in evidence is the requisition and demand of the governor of Illinois (R. 31), in which he makes no specific mention of the copy of the *accusatory affidavit* being authentic, but does therein say that the

> "papers required by the statutes of the United States *which are hereunto annexed, and which I certify to be authentic and duly authenticated in accordance with the laws of this state,"* (Illinois);

but it nowhere appears that the copy of the accusatory affidavit was one of the papers annexed. The bill of exceptions expressly states that there *was no* showing or any evidence other than what is stated therein, (R. 51), and certainly there is nothing to indicate that the papers annexed to the requisition of the governor of Illinois, included the accusatory affidavit. In the position the affidavit occupies in the bill of exceptions it is merely one of the papers certified to by the governor of California as being a correct copy of the record *in his office* (R. 30, 34, 35). Then, too, it is manifest that the statement in the requisition of the governor of Illinois that the papers annexed thereto are certified by him "to be authentic and duly authenticated in accordance with the laws of this state," (Illinois) cannot be true, as the authentication to which he refers is fatally defective even under the laws of Illinois, which require the chief justice of the Municipal Court of Chicago to certify that the clerk certifying to the papers on file therein, here one

Jeanne M. Wallace (R. 39, 40), is such clerk and that the attestation is in due form and by the proper officer; but there is no such certificate by the chief justice in respect to *Jeanne M. Wallace.* This certificate is required by paragraphs 55 and 56 of Chapter 51 of the Revised Statutes of Illinois, which are but re-enactments of sections 905 and 906 of the Revised Statutes of the United States and similar to section 1905 of the Code of Civil Procedure of California, reading as follows:

> "A judicial record of a sister state may be proved by the attestation of the clerk and the seal of the court annexed, if there be a clerk and seal, together with a certificate of the chief judge or presiding magistrate that the attestation is in due form."

It is not our contention that the authentication required by the statute is necessary in interstate rendition cases. On the contrary we concede that only the certificate of the governor of the demanding state that the accusatory affidavit is authentic, is required by section 5278 of the Revised Statutes of the United States, but in the instant case the rendition papers include what is designated on its face "Authentication for Extradition," (R. 38, 39, 40), and it is this authentication that is referred to by the governor of Illinois in his requisition on the governor of California, as making the rendition papers authentic in accordance with the laws of Illinois (R. 31). Now as the authentication to which reference is thus made and which by the way is considered very material and im-

portant by the appellate court in its reasoning and decision in *Glass v. Becker,* 25 F. (2d) 929, is in the instant case a void authentication, it results that the Illinois governor's certificate that the *papers* are authentic even did they include the accusatory affidavit, is also void, because based upon a void authentication. We say "a void authentication," as there is no certificate by *James A. Kearns,* the clerk who issued the warrant of arrest (R. 37), that the person before whom it is claimed the accusatory affidavit was made, to wit: Judge Hartigan is a judge of the municipal court of Chicago, nor is there a certificate by the chief justice that the person named clerk of the municipal court of Chicago, as being the clerk who gives the certificate and makes the attestation, to wit: Jeanne M. Wallace (R. 39, 40), is a clerk of the court, nor is there the required certificate from the chief justice of the municipal court of Chicago, to the official character of Jeanne M. Wallace as clerk of the court, nor that the certificate and attestation by Jeanne M. Wallace is in due form of law. True, the chief justice does certify to the official character of *Kearns as clerk* (R. 39, 40), *but there is no certificate or attestation by Kearns,* the attestation and certificate being only by Jeanne M. Wallace (R. 38, 39). It results that the very papers referred to in the requisition as being the basis of the certificate of the governor of Illinois, that *they* are authentic, but not specifying the copy of the accusatory affidavit and not indicating that the affidavit was one of the papers, are shown *not to be authentic* by the very authentication on

which the governor bases his certificate, even did they include the copy of the affidavit. The certificate as given by the governor of Illinois, that the *papers* are authentic is expressly based upon the authentication attached to them and which shows that they are not authentic. Now were the copy of the accusatory affidavit, one of the papers, it follows that the certificate of the governor of Illinois that it is authentic, is shown to be untrue by the manifestly void authentication *upon which it is expressly based.* True it would have been sufficient had the governor of Illinois simply certified that the copy of the affidavit is authentic, and this is all that is required on the point, by section 5278 of the Revised Statutes of the United States, but he has not done so and the papers he furnished the governor of California show affirmatively that were the copy of the affidavit one of them, it is not authentic, the authentication being clearly void on the face of it. It will be noted that section 5278 of the Revised Statutes does not require the governor of Illinois to certify that the *original* accusatory affidavit is authentic, but that the *copy* of it in the rendition papers, is authentic. Therefore, if, as in the instant case, he goes further and states that his certificate is based on the authentication appearing in the papers annexed to his requisition and the authentication is void, his certificate based upon it is also void, did it include the required copy of the affidavit. Of course any certificate that a copy of a paper is authentic, would be a nullity if the authentication on which it is based is void on the face of it as an authentication, even though no formal

authentication be necessary, it being sufficient did the governor of the demanding state simply certify the copy to be authentic and not make his certificate of authenticity dependent upon another authentication that is plainly void, and thereby showing that the copies of the papers covered by it are not authentic. What the governor of Illinois really did in his requisition is to say that the copies of the papers annexed to it are authentic, only so far as shown by the authentication accompanying them. In other words he bases his certificate that they are authentic upon the authentication. Clearly if it is void as an authentication, his certificate being expressly based upon it is also void, for it shows that the copies to which it refers are not authentic.

XI.

JUDGE HARTIGAN NOT A MAGISTRATE UNDER THE LAWS OF ILLINOIS.

The purported copy of the accusatory affidavit is stated to have been made before "Matthew D. Hartigan, Judge of the Municipal Court of Chicago." (R. 35.) Assuming him to be such, the laws of Illinois do not make him a magistrate, but on the contrary expressly deprive the judges of the court of all official authority apart from the court. In other words and owing to the peculiar statutory provisions on the subject, the judges of the Municipal Court of Chicago can only function officially in a criminal case when

sitting as a court. It is virtually so provided by section 50c of paragraph 442, chapter 37 of the Revised Statutes of Illinois, in the following terms, viz:

> "That the practice in all proceedings in the municipal court for the arrest, examination, commitment and bail of persons charged with criminal offenses shall be the same, as near as may be, as is provided by law for similar proceedings before judges of courts of record and justices of the peace, with the following exceptions:
>
> "First: The complaint shall be filed with the clerk of the municipal court, who, when so ordered by the court, shall issue a warrant, which shall be directed to the bailiff and all sheriffs, coroners and constables within this state and shall require the officer to whom it is directed to forthwith take the person of the accused and bring him before the court, and all proceedings in the case shall be proceedings in court instead of proceedings before a judge thereof and all orders entered in such proceedings shall be orders of the court instead of orders of a judge thereof and shall be entered of record as orders in other cases."

Undoubtedly a judge of the municipal court may administer an oath to an affidavit, but so may a notary public, yet this power does not in itself constitute either of them a *magistrate* within the meaning of section 5278 of the Revised Statutes of the United States. The fact that all authority to issue a warrant of arrest is denied a judge of the municipal court, shows he is not a magistrate. The law is so stated in:

25 *Corpus Juris* 264.

A notary public or a clerk may be constituted a magistrate by statute, but this is exceptional and there is no such statute in Illinois. Were it not for the restrictive provisions of the Illinois statute to the contrary, a judge of the Municipal Court of Chicago would *ex officio* be a magistrate, but the statute not only denies him the power to be such, but expressly provides that the complaint or accusatory affidavit and all other proceedings in the case must be "in court instead of proceedings before a judge thereof." It is true that in the instant case the accusatory affidavit is entitled in the Municipal Court of Chicago, but shows on its face that it was not made before the court and was made only before a judge of the court. (This is also stated at pages 35, 36, 37, 38 and 39 of the record). The same judge acting not as a court but as a judge and pursuant to the provisions of section 27 of paragraph 415, chapter 37 of the Revised Statutes of Illinois, has endorsed on the complaint or accusatory affidavit, that he has examined the same and the complainant and is satisfied that there is probable cause *for filing it* (R. 35, 36), not probable cause for the accusation; but this is clearly a void endorsement as the statute in that behalf applies only to criminal cases in the municipal court "in which the punishment is by fine or imprisonment otherwise than in the penitentiary" (R. S. Ill. sec. 27, par. 415, chap. 37), and therefore has no application to the instant case, for here the punishment is by imprisonment in the penitentiary. See statute quoted in subdivision VIII of this brief.

As we shall show further on in this brief, the offense of obtaining money by means of a confidence game can only be prosecuted by *indictment* and is one over which no jurisdiction is conferred on the municipal court, by complaint or information. A correct construction of section 5278 of the Revised Statutes of the United States requires in such a case, a copy of the *indictment* and not a copy of an affidavit. It is only where a criminal charge can be made by means of an affidavit or verified information, under the laws of the demanding state, that the affidavit will suffice. Such cases are provided for in section 27 of paragraph 415, chapter 37 of the Revised Statutes of Illinois, but are there expressly restricted to crimes not punishable by imprisonment in the penitentiary. The point will be presented in another part of this brief and the statute set forth.

XII.

ACCUSATORY AFFIDAVIT IS FATALLY DEFECTIVE AS A CHARGE OF CRIME.

The accusatory affidavit is fatally defective as a charge of crime and for the following reasons:

1. In the first place, as a complaint for preliminary examination of the accused, it is void because it does not comply with the statutory requirement in Illinois that the

> "complaint shall contain a concise statement of the offense charged to have been committed and

> the name of the person accused and that the complainant has just and reasonable grounds to believe that such person committed the offense."

The entire statute is as follows:

> "Upon complaint made to any such judge or justice of the peace that any such criminal offense has been committed, he shall examine on oath the complainant and any witness produced by him, shall reduce the complaint to writing and cause it to be subscribed and sworn to by the complainant; which complaint shall contain a concise statement of the offense charged to have been committed and the name of the person accused, and that the complainant has just and reasonable grounds to believe that such person committed the offense."
>
> R. S. Ill., Chap. 38, par. 687, sec. 2.

Now assuming that a judge of the Municipal Court of Chicago is such a judge as provided for in this statute, the accusatory affidavit in the instant case is in plain violation of the statute in omitting to contain a concise or any statement of the offense charged, or in other words and more specifically a statement of the facts constituting the crime attempted to be charged *and is also in violation of the statute in omitting to state that the complainant has just and reasonable grounds to believe that the accused committed the offense.* This latter requirement is made just as important and essential by the statute as the conjoined requirement that the complaint state the name of the person accused and contain a statement of the offense charged, and especially is it of the first

importance in an interstate rendition case where it is insistently and strenuously contended that the complainant has no just or reasonable ground to believe that the accused committed the offense and there is no probable cause whatever for making the charge against him. Undoubtedly it is competent for the Legislature to specify the elements essential to a valid complaint and the omission to comply with the statutory requirement, renders the complaint absolutely void.

2. In the second place the accusatory affidavit is void as a charge of crime in omitting to state facts sufficient to constitute the crime it attempts to charge.

As held by the Circuit Court of Appeals for the Fourth Circuit in a case never overruled or questioned on the point:

> "The affidavit required in such cases should set forth the facts and circumstances relied on to prove the crime, under the oath or affirmation of some person familiar with them whose knowledge relative thereto justifies the testimony as to their truthfulness."
>
> *Ex parte Hart,* 63 Fed. 259.

Of course an affidavit charging no crime, makes void interstate rendition proceedings based upon it. This also is well settled law.

Ex parte Smith, 3 McLean, 121;
People v. Brady, 56 N. Y. 182, 190, 191;
In re Greenough, 31 Vt. 279;
Ex parte Spears, 88 Cal. 642, 643;
Ex parte Dimmig, 74 Cal. 164, 166;

2 *Moore on Extradition,* sec. 555;
Scott on Interstate Rendition, 150.

Section 5278 of the Revised Statutes of the United States expressly requires an affidavit *charging* the person demanded as a fugitive, with having committed treason, felony or other crime. In the instant case the accusatory affidavit charges no crime, in that the Illinois statute makes necessary that the money be obtained

> "by means or by use of any false or bogus check, or by any other means, instrument or device commonly called the confidence game."

As held by the Supreme Court of the United States, an accusation is void if it omits an essential element of the crime.

United States v. Cruikshank, 92 U. S. 542, 558, 559;
United States v. Hess, 124 U. S. 483, 486;
Keck v. United States, 172 U. S. 434, 437.

To the same effect, see:

1 *Bishop's New Crim. Proc.* (2d ed.) pg. 75 and also see sec. 98a;
31 *Corpus Juris,* 703.

In the instant case there is no allegation or statement in the accusatory affidavit or complaint that the appellant Millard obtained the money "by means or by use of any false or bogus check," *and there are no facts set forth in the charge,* to show that the money was obtained by "any other means, instrument or device commonly called the confidence

game." It is true the accusatory affidavit does allege that the money was obtained

> "by means and by use of the confidence game,"

but this is clearly inadequate as it is manifestly the mere conclusion of the affiant, there being no facts stated on which the conclusion is based, to bring the charge within the terms of the statute. And this is essential. Whether or not the money was obtained by

> "the means, instrument or device commonly called the confidence game,"

as required by the statute, is a conclusion of law depending upon certain facts showing *fraud* perpetrated and the *facts* must be set forth in the accusatory affidavit or complaint, so that the *court* and not the accuser or the affiant, may determine whether the statute has been violated.

> "It is an elementary principle of criminal pleading that where the definition of an offense, whether it be at common law or by statute, includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition; but it must state the species,—it must descend to particulars."
>
> *United States v. Cruikshank,* 92 U. S. 542, 558.

Even were the language of the statute used in the accusation, it would not be sufficient.

> *United States v. Carll,* 105 U. S. 611, 612;
> *Evans v. United States,* 153 U. S. 584, 587, 588.

Then, too, the statute does not make the obtaining of the money by "confidence game" sufficient to con-

stitute the crime, but expressly states that it must be *by means, instrument or device commonly called the confidence game.* There is no such allegation or statement in the accusatory affidavit in the instant case. Clearly if the affiant was charged with perjury in falsely stating in the affidavit that the money was obtained by means, instrument and device *commonly called* the confidence game, there could be no conviction on the affidavit, as actually made, for there is no such statement in it. And if the perjury charge were that the false statement consisted in swearing that the money was obtained "by means and by use of the confidence game," it could not be sustained for want of the necessary materiality, as the statute makes it essential that the confidence game required, be what is *commonly called* such. There certainly is no statement in the accusatory affidavit in the instant case, (R. 34, 35), that the money was obtained *by means, instrument and device commonly called the confidence game.* Manifestly these words cannot be eliminated from the statute, but must be given effect. The statute plainly takes a distinction and recognizes a difference between what is *commonly called* a confidence game and a confidence game *that is not commonly called* such. In other words whether the confidence game is one that is *commonly called* such, is a question the statute in express terms makes necessary in the case and therefore it is essential to the charge that it be explicitly averred the money was obtained *by means, instrument and device commonly called the confidence game;* and further we insist that the means, instru-

ment and device must be specified so that the court may determine for itself as a matter of law, that it is what is *commonly called* the confidence game. (*United States v. Cruikshank,* 92 U. S. 558, 559). Instead of this we have in the accusatory affidavit, merely the conclusion and opinion of the affiant, that the means, instrument and device, (not disclosed nor specified), by which the money was obtained, is a confidence game, and not that it is what is *commonly called* the confidence game. Surely, and as repeatedly held by the authorities, it would not for instance, be sufficient to charge that money was obtained by means of false pretenses or representations, but it is necessary to specify the pretenses and representations. (*People v. McKenna,* 81 Cal. 158.) Clearly if the confidence game by which the money was obtained is not what is "commonly called" the confidence game, the case is not within the statute. Of course we are aware that the Illinois statute in providing for the sufficiency of an *indictment,* says that as an indictment

> "it shall be deemed and held a sufficient description of the offense to charge that the accused did, on, etc., unlawfully and feloniously obtain or attempt to obtain (as the case may be) from A B (here insert the name of the person defrauded or attempted to be defrauded), his money (or property, in case it be not money) by means and by use of the confidence game,"

but clearly this does not include an accusatory *affidavit.* The law is so stated in:

> *People v. McLaughlin,* 243 N. Y. 417, 419;
> 2 *Moore on Extradition,* page 1025.

In deciding whether for the purpose of interstate rendition proceedings there is a charge of crime, a distinction and difference exists in law between an accusatory affidavit and an indictment, there being much more stringent requirements exacted respecting the sufficiency of an affidavit to charge a crime, than in the case of an indictment. The latter is the result of a judicial investigation by the grand jury, but an affidavit is merely the *ex parte* statement of the person making it. This distinction between an indictment and an accusatory affidavit in interstate rendition proceedings is pointed out in:

People v. Brady, 56 N. Y. 182, 190, 191;
People v. McLaughlin, 243 N. Y. 417, 419;
Ex parte Hart, 63 Fed. 259;
2 *Moore on Extradition,* page 1025.

The statute in Illinois providing for the form of the *indictment* and its sufficiency, cannot be construed to apply also to an accusatory affidavit or complaint, and especially as there exists another statute in Illinois, heretofore quoted in this brief, providing for the necessary contents of the affidavit or complaint, and expressly requiring that it

> "shall contain *a concise statement of the offense charged to have been committed* and the name of the person accused, and that the complainant has just and reasonable grounds to believe that such person committed the offense."
>
> R. S. Ill., sec. 2, par. 687, chap. 38.

Manifestly this statute requires the accusatory affidavit or complaint to set forth the facts constituting the offense and every element of it, omitting none.

3. In the third place the accusatory affidavit is void as a charge of crime in that the statute on which the charge is based, to wit: section 98, par. 230, chapter 38 of the Revised Statutes of Illinois is unconstitutional, because in violation of the "due process of law" clause in the Fourteenth Amendment of the Constitution of the United States, in entirely omitting to define with requisite certainty the crime attempted to be created or to specify the elements essential to the existence of the crime or to furnish any standard by which a person may know what constitutes a "means or instrument or device commonly called the confidence game," so as to avoid violating the law. And the statute introduces a still greater amount of uncertainty in taking a very arbitrary distinction between what is *known* as the confidence game and what is *commonly called* such a game, the latter being impossible of ascertainment in advance of accusation.

Therefore, it not being possible for any man to ascertain how to conduct himself or his business or affairs so that he will not violate the statute, it operates to deprive him of his liberty without due process of law. Police officers and gamblers and bunco men may know what is *commonly called* the confidence game but the rest of the community is certainly ignorant of it. Any attempted classification of the confidence game into what is such in fact and what is

commonly *called* such, is undoubtedly arbitrary and violates the clause in the Fourteenth Amendment prohibiting the several states from denying to a person the equal protection of the laws.

Missouri R. Co. v. May, 194 U. S. 267;
Barrett v. Indiana, 229 U. S. 26;
Watson v. Maryland, 218 U. S. 79;
Atchison v. Matthews, 174 U. S. 104.

And in any event a statute omitting to define with certainty the crime it attempts to create and to prescribe the boundary line between what is and what is not prohibited, is unconstitutional and void as it operates to deprive a man of his liberty without "due process of law." It is so held in:

Cline v. Frink Dairy Co., 274 U. S. 445, 457, 458, 47 S. C. Rep. 681, 684, 685;
Connally v. General Constr. Co., 269 U. S. 385, 391, 392;
International Harvester Co. v. Kentucky, 234 U. S. 216, 221;
Collins v. Kentucky, 234 U. S. 634, 638;
United States v. Cohen Grocery Co., 255 U. S. 81, 92.

Applying the principle controlling these decisions, the statute in question is clearly unconstitutional and void. The courts of Illinois in construing the statute in question, hold that

> "the gist of the crime is the obtaining of the confidence of the victim by some false representation or device,"

and then by means of the confidence thus *fraudulently* obtained, swindling the victim out of money or property.

People v. Harrington, 310 Ill. 616;
People v. Rosenbaum, 312 Ill. 330, 332.

Clearly then, the charge or accusation is fatally defective if it does not set forth the *facts constituting the fraud* by means of which the property was obtained.

United States v. Cruikshank, 92 U. S. 558, 559;
People v. Mahoney, 145 Cal. 106, 107, 108;
People v. McKenna, 81 Cal. 158.

This is especially true of an accusatory affidavit in an interstate rendition proceeding.

People v. Brady, 56 N. Y., 182, 190, 191.

Were the facts pleaded it may well be that they would show the entire absence of a confidence game and that what the person who made the accusatory affidavit states as his conclusion or opinion to be a "confidence game," was not such, but, on the contrary, constituted a perfectly legitimate business transaction, and not at all within the statute.

People v. Santow, 293 Ill. 430;
People v. Kratz, 311 Ill. 118;
People v. Heinsius, 319 Ill. 168, 170.

There can be no difficulty in alleging in the accusation *the facts showing* the existence of a confidence obtained by means of fraudulent pretense and repre-

sentation, or by fraudulent device, and that by means of this confidence so obtained, the victim was swindled out of money or property. This, according to the decisions of the Supreme Court of Illinois, constitutes the offense of getting the money or property by means of what is commonly called the confidence game.

People v. Harrington, 310 Ill. 616;
People v. Rosenbaum, 312 Ill. 330, 332.

Taking this construction placed on the statute by the Supreme Court of Illinois as being a part of the statute and as removing the otherwise conclusive objections to its validity on constitutional grounds, it results that the accusatory affidavit must conform to this settled construction respecting the meaning of the statute, *and plead the facts constituting the fraud,* or no crime is charged, and therefore the case is not brought by the accusation, within the requirement of section 5278 of the Revised Statutes of the United States, that the accusatory affidavit to be sufficient as the basis for interstate rendition, must charge either "treason, felony or other crime". The accusatory affidavit in the instant case alleges nothing to indicate that any money or property was obtained by means of a confidence fraudulently induced, nor that by means of such confidence so fraudulently induced, the U. S. Health Films, Inc., was swindled out of its money or property. It results that the affidavit charges no crime. The facts constituting the *fraud* denounced by the statute are not pleaded. It was for this reason the accusatory affidavit in *People v. Brady,* 56 N. Y.

182, was held insufficient to sustain the interstate rendition proceedings there involved, and the accused was accordingly discharged on habeas corpus. If, as held in *Maxwell v. People,* 158 Ill. 248, the offense is not susceptible of definition, then so much the worse for the statute, on constitutional grounds; but we are certain that the facts constituting the *fraud* can and should be specially pleaded in the accusation.

XIII.

MUNICIPAL COURT OF CHICAGO HAS NO JURISDICTION OF THE CASE.

1. We have in this brief (subdivision XI), already pointed out that by express provision of the Illinois statute (R. S. Ill., chap. 37, par. 442, sec. 50c), all orders and proceedings in the matter of the accusation, arrest, examination, commitment and bail of persons charged with criminal offenses, are required to be *in court* "instead of proceedings before a judge thereof", and that as the accusatory affidavit or complaint that is made the basis of the inter-state rendition proceedings in the instant case, was made before a judge of the court and not before the court, it is a nullity, as the statute denies all authority and jurisdiction to the judge and vests it exclusively in the court *as a court.*

2. But if it be contended that the complaint is to be considered as an information in the Municipal Court of Chicago, the court would still have no juris-

diction of it, as the crime, if any charged, is one that is punishable in the penitentiary. Section 27 of paragraph 415 of chapter 37 of the Revised Statutes of Illinois is as follows:

> "All criminal cases in the municipal court in which the punishment is by fine and imprisonment otherwise than in the penitentiary, may be prosecuted by information of the Attorney General or State's Attorney or some other person and when an information is presented by any person other than the Attorney General or State's Attorney it shall be verified by affidavit of such person that the same is true or that same is true as he is informed and believes."

By section 8 of article 2 of the constitution of Illinois, all offenses punishable by imprisonment in the penitentiary must be prosecuted by indictment of the grand jury and not by information. More than this the accused Millard cannot be held to answer but upon indictment. The provision is as follows:

> "No person shall be held to answer for a criminal offense unless on indictment of a grand jury, except in cases in which the punishment is by fine or imprisonment otherwise than in the penitentiary, in cases of impeachment, and in cases arising in the army and navy, or in the militia when in actual service in time of war or public danger. Provided the grand jury may be abolished by law in all cases."

The court will take judicial notice that in Illinois the grand jury has not been abolished. Under this constitutional provision an indictment is jurisdictional.

Ex parte Bain, 121 Cal. 1.

It results that the municipal court of Chicago has no jurisdiction of a charge punishable in the penitentiary when prosecuted by complaint or information and not by indictment.

XIV.

REVERSIBLE ERROR IN REJECTING EVIDENCE.

At the hearing of the case the District Court on objection by the appellee rejected the offer of appellants to prove that the accusation and the rendition proceedings based upon it are without probable cause and in perversion, subversion and fraud of the laws relative to interstate rendition. The rejected offer of proof will be found at pages 47, 48 and 49 of the Record and is as follows:

> "We offer to prove if the court please, that the accused, S. S. Millard, is not a fugitive from justice and in that behalf to show by sufficient evidence that on the 4th day of November, 1927, he obtained by means of a perfectly legitimate business transaction with the U. S. Health Films, Inc., an Illinois corporation, and as a loan by the corporation to him, the sum of twenty-five thousand dollars, for which he executed his two certain promissory notes not yet matured, one in the sum of fifteen thousand dollars and one in the sum of ten thousand dollars, fully secured by transfer to the corporation of property exceeding in value the amount loaned him. We propose to show that it is this perfectly legitimate business transaction, that is wrongly, maliciously and wantonly and for purpose solely of private revenge made the exclusive and only basis of the

charge, the altogether false charge on which these extradition or more accurately these inter-state rendition proceedings are based, in fraud and perversion of the Constitution and laws of the United States. We propose further to prove that the very matters connected with the making of the loan and the written contracts out of which the transaction was had between the parties, and the loan itself are involved in a suit in equity brought by Millard as plaintiff against the U. S. Health Films, Inc., in the United States District Court, Northern District of Illinois, Eastern Division, being case No. 8000 in that court and still pending there awaiting trial in due course; and we will prove if permitted, that this suit was brought long prior to the accusation which is made the basis of these inter-state rendition proceedings. We will show that according to the decisions of the Supreme Court of Illinois and particularly in the cases of *People v. Santow,* 293 Ill. 430, *People v. Kratz,* 311 Ill. 118 and *People v. Heinsius,* 319 Ill. 168, 170, that the transaction in and by which Millard obtained the loan of twenty-five thousand dollars, was and is a perfectly legitimate business transaction, no confidence game and does not constitute under the laws of Illinois a confidence game nor the obtaining of money by the use or means of what is commonly known as a confidence game. On the facts stated and which we here offer to prove in this habeas corpus case we will thereby show to this court that Millard is not a fugitive from justice. That we have the legal right to prove the facts stated for this purpose, we cite to the court the following authorities: *Matter of Strauss,* 197 U. S. 324, 332, 333; *Pettibone v. Nichols,* 203 U. S. 192; *McNichols v. Pease,* 207 U. S. 110; *Ex parte Slauson,* 73 Fed. 666; *Tennessee v. Jackson,* 36 Fed. 258; *In re Cannon,* 47 Mich. 481, 486, 487; *Ex parte*

> *Owens,* 245 Pac. 68. Our purpose is not to bring to trial in this habeas corpus case, any issue or question of guilt or innocence, but to show that no such issue and no such question is possible and that the accusation itself is false and fraudulent, that it is without reasonable or probable cause and is in fraud and perversion of the Constitution and laws of the United States relative to inter-state rendition and that the accused is not a fugitive from justice."

When the objection of appellee to this offer of proof was sustained and the evidence rejected by the court, the appellants then and there duly excepted, as shown by the record, page 51.

1. It is perfectly clear that unless the accused is permitted to attack the validity of the rendition proceedings upon the grounds of fraud and illegality, *and by proving want of probable cause for the accusation,* he has no remedy, but must submit to being taken from his home to a far distant state and there placed on trial upon a charge which, according to the necessary implication of the objection made by the appellee to the proffered proof, is admitted to be false and fraudulent and without reasonable or probable cause to justify it. Such is undoubtedly the interpretation the law gives the appellee's objection to the offer of proof.

Scotland Co. v. Hill, 112 U. S. 183, 186.

Unless the appellant Millard is permitted to show in this *habeas corpus* case as against the validity of the rendition proceedings, that the accusation is fraudulent and without probable cause, he is clearly without

remedy for the atrocious fraud perpetrated on the law and against him, as it cannot be shown on the trial of the charge, for then the rendition proceedings have terminated and become *functus officio,* and the illegality of the method in which he is brought into the jurisdiction of Illinois is immaterial and no defense to him, and no valid basis for objection by him, as held in *Ker v. Illinois,* 119 U. S. 436, *Cook v. Hart,* 146 U. S. 183, and *Pettibone v. Nichols,* 203 U. S. 192.

XV.

DETERMINATIVE FACTS THAT ARE ADMITTED BY THE APPELLEE ON THE FACE OF THE RECORD.

In the petition for habeas corpus, facts are alleged showing that the rendition proceedings are a fraudulent and illegal scheme of extortion (R. 4). As the averments of the petition in that respect are not controverted in the return, nor by evidence (R. 11, 29, 51), they are deemed admitted by the appellee, (*Kohl v. Lehlback,* 160 U. S. 293; *Ex parte O'Connor,* 52 Cal. App. Dec. 293). Surely the law will not sanction the use of the rendition process for any such illegal and fraudulent purpose. Facts are also alleged in the petition (R. 4, 5), showing that the rendition proceedings are in violation and subversion of the jurisdiction of the United States District Court, Northern District of Illinois, Eastern Division, and this is not controverted by the return nor by evidence (R. 11, 29, 51), and must therefore be deemed admitted by the appellee. It is

also alleged in the petition that the accusatory affidavit was not on file in any court at the time of the issuance of the requisition nor at the time of the issuance of the warrant of rendition, nor subsequent thereto (R. 3), and this fact is not controverted in the return, nor in the evidence (R. 11, 29, 51), and is therefore deemed admitted by the appellee. Section *50c*, par. 442, chap. 37 of the Revised Statutes of Illinois, expressly requires the accusatory affidavit or complaint to be filed in the Municipal Court of Chicago, and of course it can have no legal efficacy or effect and is not such a judicial proceeding as required by the law pertaining to interstate rendition, *until it is filed.* The only reference to a filing of the complaint is in the warrant of arrest issued by James A. Kearns as clerk (R. 37), and in a certificate by Jeanne M. Wallace which recite in a stereotyped form, that the complaint was filed, but this is clearly insufficient to prove the necessary filing, according to the law as stated in:

Glass v. Becker, 25 F. (2d) 929.

There is no endorsement of filing, on the accusatory affidavit, (R. 34, 35, 36).

Then, too, and as already pointed out in this brief, there is nothing in the record, no sufficient authentication to show that the attestation is in due form as required by the law of Illinois, nor that Wallace is a clerk of the court (R. 39, 40). See subdivision X of this brief. There is no certificate by Kearns.

XVI.

FRAUD VITIATES RENDITION PROCEEDINGS. PROBABLE CAUSE NECESSARY FOR RENDITION CHARGE. VOID ACCUSATORY AFFIDAVIT.

But on the point that the accused Millard has the legal right to show in this *habeas corpus* case that the rendition proceedings are fraudulent and for purpose only of extortion and private revenge, we cite the following authorities:

Matter of Strauss, 197 U. S. 324, 332, 333;
Tennessee v. Jackson, 36 Fed. 258;
Ex parte Slauson, 73 Fed. 666;
In re Cannon, 47 Mich. 481, 486, 487;
Ex parte Owens, 245 Pac. 68.

As stated by the Supreme Court respecting the matter:

> "Courts will always endeavor to see that no such attempted wrong is successful."
>
> *In re Strauss,* 197 U. S. 333.

Manifestly this can only be done by holding that the fraud makes void the rendition proceedings; but such ruling cannot be made after the proceedings terminate and become *functus officio.* It is not a question of guilt or innocence of the accused, that the court is asked to determine, but purely one of atrocious fraud on the law itself, making entirely void *ab initio* the rendition process in the case.

2. In the next place the offer of proof the District Court rejected, shows that the very charge on which

the rendition proceedings are based, *has no probable cause to justify or sustain it.* And the offer of proof specifically states that

> "our purpose is not to bring to trial in this habeas corpus case any issue or question of guilt or innocence, but to show that no such issue and no such question is possible and that the accusation itself is false and fraudulent, that it is without reasonable or probable cause" (R. 49).

Showing that the accusation is without *probable cause* does not involve a trial of the case on the issue of guilt or innocence as distinctly held by the Supreme Court in *Tinsley v. Treat,* 205 U. S. 20, 29, 32; and it is held that where there is no probable cause for the accusation, there can be no valid rendition proceedings.

Blevins v. Snyder, 22 Fed. (2d) 876, 877;
Tinsley v. Treat, 205 U. S. 20, 29, 32.

Of course it would be preposterous for the appellee or any one else to contend that even though there is *no probable cause for the charge,* there can nevertheless be valid rendition proceedings upon it.

3. In the third place, the statutory law of Illinois expressly requires that the accusatory affidavit or complaint on a criminal charge, shall contain a statement "that the complainant has just and reasonable grounds to believe that such person (the accused) committed the offense."

R. S. Ill., chap. 38, par. 687, sec. 2.

The accusatory affidavit or complaint in the instant case, entirely omits the required statement. Therefore,

being in violation of the statute, it is void as a charge of crime. *The failure to insert in the charge that the complainant has just and reasonable grounds to believe that the accused committed the offense, is conclusive that no such grounds or belief existed.* It is said by standard authority:

> "In reading an affidavit the court will look solely at the facts deposed to, and will not presume the existence of additional facts or circumstances in order to support the allegations contained in it. To the above, therefore, and similar cases, occurring not only in civil but also in criminal proceedings, the maxim *quod non apparet non est*—that which does not appear must be taken in law as if it were not—is emphatically applicable."
>
> *Broom's Legal Maxims* (8th Am. Ed.) 163.

In other words, the legal aspect of the point we are presenting is precisely the same as if the accusatory affidavit in the instant case had stated there is no probable cause for the charge. Surely any rendition proceedings based upon such an affidavit and such a confessedly unfounded charge of crime, would be absolutely void, and would at least establish on the face of the rendition record itself, that the accused is not a "fugitive from justice" of Illinois, as effectively as if it had been expressly stated in the charge that there exists no evidence to justify or sustain it. To sanction inter-state rendition proceedings in such a case would clearly be in fraud of the law relative to the subject and defeat the very purpose of the statute (R. S. U. S., sec. 5278), which is to surrender the

fugitive for only legitimate and not unlawful prosecution, the latter being clearly the case where it is virtually or expressly admitted by the accuser, on the face of the rendition record itself, that there is no evidence to support the charge, and no probable cause to justify it as an accusation. A criminal charge without any evidence to support it, is clearly void of authority in law, for manifestly legitimate prosecution or lawful conviction on such an unfounded charge is impossible in law and justice. No man can be a "fugitive from justice" if there is no evidence to prove him guilty of crime. In such cases absence of evidence of crime and absence of crime are one and the same thing, for all practical purposes. It would manifestly be ridiculous and worse than futile to extradite a man on a charge of crime when *ex concessi* there is no evidence to show even probable cause for the accusation. Clearly in such a case the law prohibits the extradition or rendition, on the ground that if there is no probable cause for the charge made against him the accused is not a fugitive from justice; and as the law will not do what is a vain and idle thing, *lex nil frustra facit,* it will not sanction or authorize his rendition on an unfounded criminal charge, that has no probable cause to support it. This is an altogether different matter from a trial of the case upon an issue of guilt or innocence as distinctly held in *Tinsley v. Treat,* 205 U. S. 20, 29, 32, and for that reason the authorities cited at page 20 of appellee's brief are not in point in that respect.

No case can be found in the books, holding that absence of probable cause for a criminal charge, is not sufficient to defeat rendition proceedings based upon it. The fact that the evidence offered by appellant Millard and ruled out by the District Court would not only establish a want of probable cause for the charge, but prove his innocence, is clearly no objection to its admissibility for the purpose of establishing want of probable cause for the accusation. It is held that in removal proceedings from one Federal district to another, there must exist *probable cause* for the charge.

Beavers v. Henkel, 194 U. S. 73, 83;
Tinsley v. Treat, 205 U. S. 20, 27, 29, 32.

And the same rule is held applicable to removal applications in both rendition and extradition cases.

Fernandez v. Phillips, 268 U. S. 311, 312;
Blevins v. Snyder, 22 F. (2d) 876, 877.

Then, too, the refusal to permit evidence of want of probable cause is a denial of the "due process of law", guaranteed the appellant Millard by the Fifth Amendment to the Constitution of the United States. So held in:

United States v. Comr., etc., 273 U. S. 103, 106.

It results that for the reasons we have given, the District Court erred in excluding the proffered evidence of want of probable cause for the accusation.

XVII.

CONCLUSION.

We have read the brief filed for the appellee and surely it cannot be correctly said that it furnishes a relevant reply to any one of the many conclusive points urged by appellants, and which entitle them on the case as it is presented by the record, to a *reversal* of the order and judgment of the District Court, with direction to discharge the appellant Millard from the imprisonment complained of in the petition for habeas corpus.

All of which is respectfully submitted.

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Counsel for Appellants.

Dated at San Francisco this 7th day of July, 1928.

No. 5485

IN THE

United States

Circuit Court of Appeals

For the Ninth Circuit.

S. S. MILLARD,

Appellant,

vs.

WILLIAM I. TRAEGER, Sheriff of the County of Los Angeles, State of California,

Appellee.

BRIEF OF APPELLEE.

ASA KEYES,
District Attorney, Los Angeles County, State of California,

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Deputy District Attorney, Los Angeles County, State of California,
Attorneys for Appellee.

TABLE OF CONTENTS.

TABLE OF CASES CITED.

M

P

R

S

T

W

TABLE OF STATUTES.

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Appellee.

BRIEF OF APPELLEE.

STATEMENT OF FACTS.

On the 17th day of April, 1928, one George D. Collins filed in the United States District Court in and for the Southern District of California, Southern Division, Honorable William P. James, Judge, a petition for a Writ of Habeas Corpus on behalf of the above-named appellant, S. S. Millard. The petition was not verified by said Millard, but was verified by said Collins, who stated as the reason why said Millard did not make and verify the petition that he was imprisoned in the County Jail of

the County of Los Angeles, State of California, and for that reason was unable to do so; that the necessary delay in an attempt to have him do so might entail his possible removal beyond the jurisdiction of the court before he could sign and verify the petition. (R., p. 1.)

The petition further alleges that Millard was imprisoned and restrained of his liberty by the Appellee, William I. Traeger, Sheriff of said County of Los Angeles, and in the County Jail in the City of Los Angeles, in said County, under and by virtue of certain void interstate rendition proceedings, and by the alleged authority of a void warrant of rendition, heretofore issued by the Governor of the State of California on requisition of the Governor of the State of Illinois, and against said Millard.

Various grounds were alleged for the claim that said imprisonment of said Millard was illegal and in violation of the Constitution and Laws of the United States. Briefly stated, these grounds are as follows: Substantially the same grounds as those set forth in his assignments of alleged error.

1. That the accusatory affidavit on which the rendition proceeding was based did not charge the said Millard with treason, felony, or other crime, and was not on file in any court at the time of the issuing of the requisition.

2. That Millard did not flee from justice in the State of Illinois, nor take refuge in the State of California, and was not a fugitive from justice, and committed no crime in the State of Illinois.

3. That no accusatory affidavit was made before a magistrate of the State of Illinois, charging said Millard with having committed treason, felony, or other crime; that the only accusatory affidavit was one made before one of the Judges of the Municipal Court of Chicago, and that said Judge of said Municipal Court of Chicago is not a magistrate, and that he is denied by the laws of Illinois the power to issue a warrant of arrest.

4. That the interstate rendition proceeding had been issued in bad faith, and had been executed by one Leon E. Goetz, the accuser of said Millard, solely for the purpose of extorting on behalf of himself and the U. S. Health Films, Incorporated, a corporation, and from said Millard by means of said accusation, certain property, consisting of negatives and prints of certain moving pictures, which were the subject of a civil suit in the State of Illinois, then pending between said Millard and said Goetz. (R., pp. 1–3.)

A Writ of Habeas Corpus was granted and issued by said United States District Court and, on the return day of said Writ, an Answer and Return thereto was filed by the said William I. Traeger, such Sheriff, in which he admitted that said Millard was in his custody as such Sheriff, and alleged that he held him in such custody by virtue of a Warrant issued out of the Municipal Court of the City of Los Angeles, a copy of which was attached to the Answer and Return and made a part thereof, charging said Millard with being a fugitive from the justice of the State of Illinois, and also by virtue

of a Rendition Warrant issued by the Governor of the State of California, after a full hearing on the merits for the rendition of said Millard to the State Agent of the State of Illinois for the crime of felony in having fraudulently obtained from the U. S. Health Films, Incorporated, the sum of Twenty-five Thousand Dollars ($25,000.00), in money of the United States of America, by the means and use of the "confidence game," as more fully appeared by said Rendition Warrant, a copy of which was attached to the said Answer and Return and made a part thereof. (Rendition Warrant, R., p. 17.)

The Answer and Return further alleged that, prior to the issue and service upon said Sheriff of the Writ of Habeas Corpus in this proceeding, a Writ of Habeas Corpus had been obtained by Millard from the Superior Court of the State of California, which Writ was in full effect and force and was pending at the time the petition for this Writ was verified and presented to the United States District Court. The Sheriff therefore prayed that the Writ be dismissed and the said Millard be remanded to the custody of the State Agent of the State of Illinois, as provided by the Rendition Warrant of the Governor of the State of California. (R., p. 11.)

The Petitioner, George D. Collins, thereupon filed an Answer, or Traverse, to said Return to said Writ of Habeas Corpus, in which he attempted to put in issue the allegation of the Return that a similar habeas corpus proceeding was pending in the State Court, by alleging that the petition for the Writ of

Habeas Corpus in the Superior Court of Los Angeles County and the Writ issued thereof had no reference or relation whatever to the custody or imprisonment of the said S. S. Millard by the said sheriff of said County of Los Angeles, but, on the contrary, had reference entirely to another and entirely different custody and entirely different restraint of liberty, not involved in the petition filed herein in the United States District Court, etc., the Answer and Traverse further, in substance, reiterated the allegations of the petition in this proceeding as to the complaint and warrant in the Municipal Court of the City of Chicago and as to the claim that the crime of "confidence game" was not a public offense. (R., pp. 19–28.)

Thereafter this proceeding came on for a hearing before said United States District Court, Honorable William P. James presiding, and the original Warrant of Rendition issued by the Governor of the State of California was produced, read and offered in evidence, and also a certified copy of the extradition papers upon which the Governor of the State of California acted in issuing said Warrant. (R., pp. 31–46.) As no attack is made upon the sufficiency of these papers, except on the ground that the complaint does not state a public offense, and on the ground that it was not sworn to before a magistrate, as required by the provisions of the U. S. Revised Statutes regulating extradition, which grounds will be fully considered below in this brief, such papers need not be recited here, any further than to state that they are in the usual form required by the rules for interstate extradition proceedings which

have been adopted and followed by the Governors of various states, including the State of Illinois and the State of California.

The prisoner, S. S. Millard, also known as Elid Stanich, was then sworn as a witness in his own behalf, and he was asked the question: "Did you, on or about the 4th day of November, 1927, obtain from the U. S. Health Films, Inc., an Illinois corporation, the sum of $25,000?" This was objected to by counsel for the Appellee-Sheriff, on the following ground: (See R., pp. 46–51.)

> "Mr. Becker: I object to that on the ground that it is not a question that can be litigated in this proceeding or put in issue; that the rendition warrant of the Governor of the State of California which has already been offered in evidence here by the petitioner himself, and also set up in the return and referred to in the petition, forecloses any such inquiry; that it is presumed that the magistrate who issued the warrant acted advisedly and on probable cause. The papers are all certified to as authentic by the Governor and that question is not open to inquiry here in this proceeding."

The District Court then ruled as follows, addressing counsel for the prisoner:

> "For your record perhaps you had better state what you propose to show by the witness, so the record may be clear as to what is to follow.
>
> "Mr. Morris, counsel for prisoner: I propose to show by this witness the transaction upon

which this warrant is based is purely and simply a civil matter.

"By the Court: It is well that you now make your complete offer so we may have the offer. Let the record show specifically what you expect to prove.

"Mr. Morris: We offer to prove, if the court please, that the accused, S. S. Millard, is not a fugitive from justice and in that behalf to show by sufficient evidence that on the 4th day of November, 1927, he obtained by means of a perfectly legitimate business transaction with the U. S. Health Films, Inc., an Illinois corporation, and as a loan by the corporation to him the sum of twenty-five thousand dollars, for which he executed his two certain promissory notes not yet matured, one in the sum of fifteen thousand dollars and one in the sum of ten thousand dollars, fully secured by transfer to the corporation of property exceeding in value the amount loaned him. We propose to show that it is this perfectly legitimate business transaction, that is wrongly, maliciously and wantonly and for purpose solely of private revenge made the exclusive and only basis of the charge, the altogether false charge on which these extradition, or more accurately, these interstate rendition proceedings are based, in fraud and perversion of the Constitution and laws of the United States. We propose further to prove that the very matters connected with the making of the loan and the

written contracts out of which the transaction was had between the parties, and the loan itself are involved in a suit in equity brought by Millard as plaintiff against the U. S. Health Films, Inc., in the United States District Court, Northern District of Illinois, Eastern Division, being case No. 8000 in that court and still pending there awaiting trial in due course, and we will prove if permitted, that this suit was brought long prior to the accusation which is made the basis of these interstate rendition proceedings. We will show that according to the decisions of the Supreme Court of Illinois, (citing authorities) the transaction in and by which Millard obtained the loan of twenty-five thousand dollars, was and is a perfectly legitimate business transaction, no confidence game and does not constitute under the laws of Illinois a confidence game, nor the obtaining of money by the use or means of what is commonly known as a confidence game. On the facts stated and which we here offer to prove in this habeas corpus case we will thereby show to this court that Millard is not a fugitive from justice. That we have the legal right to prove the facts stated for this purpose, we cite to the court the following authorities, (citing authorities):

"Our purpose is not to bring to trial in this habeas corpus case any issue or question of guilt or innocence but to show that no such issue and no such question is possible and that

the accusation itself is false and fraudulent, that it is without reasonable or probable cause and is in fraud and perversion of the Constitution and laws of the United States relative to interstate rendition and that the accused is not a fugitive from justice."

"By Mr. Becker, counsel for Respondent-Sheriff: It is understood, I believe, by this offer—to make it perfectly clear on the record—that the Petitioner is not offering to testify or prove that he was not actually in the State of Illinois at the times charged in the complaint and warrant involved in this proceeding, but simply because, as he did not commit any offense and therefore he is not a fugitive. Am I correct?

"By Mr. Morris, counsel for Petitioner: Yes.

"By Mr. Becker: I renew my objections to the offer on the same grounds heretofore stated. It is not a permissible subject for inquiry in this proceeding. That matter must be tried out in the State courts of Illinois after the Petitioner is brought there to answer. It is not a subject of inquiry here."

"The Court: I will sustain the objection. To which ruling the petitioner and the said S. S. Millard then and there duly excepted."

The Petitioner then rested his case.

To meet the proposition that the complaint and accusation had been properly sworn to and warrant issued by a court of competent jurisdiction and a magistrate thereof, counsel for the Respondent-

Sheriff offered in evidence, and the court received in evidence, Section 389, of Chapter 37 of the Criminal Code of the State of Illinois, which reads as follows:

> "There shall be established in and for the City of Chicago, a Municipal Court, which shall be a court of record and shall be styled a Municipal Court of Chicago";

also Section 390 of said Chapter 37 of said Code, which reads as follows:

> "The Municipal Court shall have jurisdiction in the following cases: * * * cases to be designated and hereinafter referred to as cases of the sixth class, which shall include (b) all proceedings for the arrest, examination, commitment and bail, of persons charged with criminal offenses";

also Section 442 of said Chapter 37 of said Code, which reads as follows:

> "The practise and all proceedings in the Municipal Court for the arrest, examination, commitment and bail, of persons charged with criminal offenses shall be the same as near as may be as provided by law for similar proceedings before justices of courts of record and justices of the peace, with the following exceptions: 1. The complaint shall be filed with the Clerk of the Municipal Court, who, when ordered by the court, shall issue a warrant, etc."
>
> (R., pp. 50–52.)

The case was then closed, and the District Court granted an order discharging and dismissing said

Writ of Habeas Corpus herein, and remanding the prisoner to the custody of the Respondent-Sheriff. From this order the appellant, Millard, has appealed to this court, a bill of exceptions has been duly settled by the Judge of the United States District Court, and this case is now here for determination on said appeal.

POINT I.

Sections 1282 and 1283 of the Judicial Code of the United States make an absolute requirement that the petition in habeas corpus proceedings must be made and verified by the person restrained of his liberty in person. The petition in this case is made and verified by one George D. Collins, and not by the Petitioner, and, for this reason, it was properly denied and the prisoner remanded.

The only excuse for its having been made and verified by Collins, and not by the prisoner, stated therein is, that the prisoner was in jail, and for that reason was unable to do so, and that the necessary delay in an attempt to have him do so might entail his possible removal beyond the jurisdiction of the court before he could sign and verify the petition.

It is respectfully submitted that this is no excuse at all, and no reason for not complying with the express requirements of the Judicial Code. No claim is made that Collins or the prisoner had applied to the proper authorities that Millard be permitted to make and verify the petition in jail, and it is absurd to suppose that, if any such application was made, it would have been refused.

We understand that this question is now before this Court in Case No. 5415, Virgil Adair, Appellant, vs. E. B. Benn, U. S. Marshal for the Western District of Washington, Appellee, upon appeal from the United States District Court for the Western District of Washington, Southern Division, in which the case of Ex parte Hibbs, 26 Fed. 421, 435, is cited by counsel for Appellee Benn.

POINT II.

The Return of the Appellee-Sheriff alleges that a Writ of Habeas Corpus had been obtained in the Superior Court of the State of California, in and for Los Angeles County, and was then pending at the time of the filing of the petition herein in the United States District Court. The Answer, or Traverse, of the Petitioner Collins, when analyzed carefully, does not deny that such a proceeding was pending in the State Court on the 17th day of April, 1921. It simply alleges that the custody and restraint of liberty involved in the petition filed in the said Superior Court "was not involved in the petition herein in said United States District Court, nor involved in the Writ of Habeas Corpus issued by said Court." The Answer, in effect and in terms, admits that some such petition had been filed and a writ issued by said Superior Court.

We respectfully submit that this is no denial at all, and it does not reach the point raised by the Return of the Sheriff, and shown on the face of the petition in this proceeding, that the original petition filed by said Collins on behalf of said prisoner, Millard, made no reference whatever to there hav-

ing been any petition filed in the Superior Court for any Writ of Habeas Corpus, as required by Rule 50 of the Rules of said District Court, of which this Court will take judicial notice, and which reads as follows:

> "Any person applying for a Writ of Habeas Corpus shall furnish with the petition a copy thereof for service upon the party to whom the Writ shall be addressed.
>
> "The petition shall set forth the facts upon which it is claimed that the Writ should be issued. Mere conclusions of law set forth in the petition will be disregarded by the court.
>
> "If a previous application for a Writ of Habeas Corpus has been made in the same matter, to any other court, that fact shall be set forth in the petition and the action of said court upon said petition shall be set forth therein." * * *

We insist that this requirement is jurisdictional, and it was taken advantage of by the allegation in the Return of the Sheriff, which should have the same force as a preliminary objection.

POINT III.

There is no legal merit in the contention of the Appellant Millard that the complaint which was sworn to before Honorable Matthew D. Hartigan, one of the Judges of the Municipal Court of Chicago, and which was the basis for the extradition proceedings challenged in this case, was not sufficient in form and did not state a public offense.

This complaint, a copy of which, duly certified, was offered and received in evidence on the hearing of this matter, follows the language of Paragraph 98 of Chapter 38 of the Criminal Code of the State of Illinois (see Callahan's Illinois Statutes, Vol. 3, p. 2493). This statute is also set out in full in the application of the District Attorney of Cook County, Illinois, for the extradition of said Millard, all of which form a part of the papers acted upon by the Governor of the State of California. It is also quoted, *verbatim,* in the case of Maxwell vs. People, 158 Ill. 248, s. c., 41 N. E. Rep., p. 995, at p. 997, and is as follows:

> "Every person who shall obtain, or attempt to obtain from any other person, or persons, any money or property by means or use of any false or bogus checks, or by any other means, instrument, or device, commonly called 'the confidence game,' shall be imprisoned in the penitentiary not less than one year nor more than ten years."

This statute was expressly held not to be void for uncertainty, in People vs. Bertsche, 265 Ill. 272, in which it was also held that the fact that the swindling scheme took the form of a business transaction was not material and was not a defense. It was also so considered in Graham vs. People, 181 Ill. 477, s. c., 47 L. R. A. 731; People vs. Clark, 256 Ill. 14; People vs. Brady, 272 Ill. 401.

In the Maxwell case, the Supreme Court of Illinois said, quoting from Morton vs. The People, 47 Ill. 468:

"As these devices are as various as the mind of man is suggestive, it would be impossible for the legislature to define them, and equally so to specify them in an indictment; therefore the legislature has declared that an indictment for this offense shall be sufficient if the allegation is contained in it that the accused did, at a certain time and place, unlawfully and feloniously obtain, or attempt to obtain, the money or property of another by means and by use of the 'confidence game,' leaving it to be made out by the proof the nature and kind of the devices to which resort was had."

As stated in the foregoing cases, the section immediately following Paragraph 98, viz.: Section, or Paragraph 99 of the Illinois Criminal Code (See Chapter 38, Sec. 231, Vol. 3, Callahan's Illinois Statutes, p. 2498), states that an allegation of the commission of this offense known as "the confidence game" shall be deemed sufficient if it follows the language of the statute, and so all these Illinois cases hold. It seems unnecessary to make any further argument on this point.

POINT IV.

On the hearing before the District Court, the Petitioner there contended, and makes the claim here, that the said complaint was not sworn to before a magistrate, and his petition for the Writ of Habeas Corpus herein so alleges. This is utterly fallacious.

On the hearing, as shown by the Statement of Facts hereinbefore made, the Respondent-Sheriff put in evidence, and there was received in evidence without objection, copies of the Statutes of the State of Illinois, to wit, Section 389 of Chapter 37 of the Criminal Code of the State of Illinois, Section 390 of Chapter 37 of said Code, and Section 442 of Chapter 37 of that Code, which provide that the Municipal Court of the City of Chicago shall be a COURT OF RECORD, and shall have jurisdiction in all proceedings for the arrest, examination, commitment and bail, of persons charged with criminal offenses, and that the practise in all proceedings in that court for the arrest, examination, commitment and bail, of persons charged with criminal offenses shall be the same, as near as may be provided by law, for similar proceedings before justices of the courts of record and justices of the peace, with the following exceptions: 1. The complaint shall be filed with the Clerk of the Municipal Court who, when ordered by the Court, shall issue a warrant; and also Section 686 of Chapter 38 of said Code, which gives the Municipal Court jurisdiction and power to issue warrants for the apprehension of persons charged with offenses, except as such as are cognizable exclusively by justices of the peace, and any judge of a court of record, in vacation as well as in term time, or any justices of the peace are authorized to issue process, etc.

In this case the extradition papers showed that the complaint sworn to before one Matthew D.

Hartigan, who was certified to by the Governor of Illinois as being a judge of the Municipal Court, and the warrant was issued by the Court itself and witnessed by the Clerk of the Court. All of these papers were certified to as genuine and authenticated by the Governor of Illinois, and were received and accepted as such by the Governor of the State of California.

For this reason, if for no other, they must be so taken and accepted by any court on habeas corpus proceedings.

A multitude of authorities could be cited in support of this contention, but it should be enough for our purposes to cite the case of Compton vs. Alabama, 214 U. S. 1, which is quoted by this court and followed in the recently decided case of Glass, Appellant, vs. Becker, Sheriff, et al., Appellees, No. 5259, opinion filed April 16th, 1928, not yet reported in the Federal Reports, as follows:

> "When it appears, as it does here, that the affidavit in question was regarded by the executive authority of the respective states concerned as a sufficient basis in law for their acting—the one in making the requisition, the other in issuing a warrant for the arrest of the alleged fugitive—the judiciary should not interfere on habeas corpus and discharge the accused upon technical grounds, unless it be clear that what was done was in plain contravention of law."

This court cites Ex parte Regal, 114 U. S. 642, 652; Tiberg vs. Warren, 192 Fed. 458; In re

Strauss, 125 Fed. 326; Webb vs. Yorke, 79 Fed. 616, 622.

In the case of In re Strauss, 197 U. S. 324, 49 L. Ed. 774, a verified complaint before a magistrate was held to be the equivalent of "an affidavit" within the meaning of the extradition statute. This case also gives the word "charged" in such statute its broadest possible meaning.

In Lott vs. Davis, 264 Ill. 288, the Supreme Court of Illinois construed the constitutional amendment permitting the creation of a Municipal Court of the City of Chicago, and held that the purpose of this amendment was to create a court with the jurisdiction and functions of justices of the peace and police magistrates and to abolish those offices for the territory within the City of Chicago.

In In re Keller, 36 Fed. 681, it was even held that an affidavit which was required by the Federal law to be sworn to before a magistrate was complied with when sworn to before one "J. M.," Clerk of the Municipal Court, it being presumed that it was taken in the court. And see also Grim vs. Shine, 187 U. S. 180; s. c. 47 L. Ed. 130.

POINT V.

The Petitioner on the hearing in the United States District Court called the prisoner Millard as a witness, and offered to prove by him that, inferentially, he was not a fugitive from justice, because, as stated by his counsel, his purpose was "not to bring to trial in this habeas corpus case any issue or question of guilt or innocence, but to

show that no such issue and no such question is possible, and that the accusation itself is false and fraudulent and that it is without reasonable or probable cause, and is in fraud and perversion of the Constitution and laws of the United States relative to interstate rendition." He added the words "that the accused is not a fugitive from justice." Counsel for the Respondent-Sheriff, having in mind the well-established right of a person whose extradition is sought, even after a Rendition Warrant has been issued by the Governor of the demandant state, to show that he was not a fugitive from justice because he was not in the demanding state at the time of the commission of the crime, promptly eliminated that proposition as follows: (R., p. 46.)

> "By Mr. Becker counsel for Respondent-Sheriff: It is understood, I believe, by this offer —to make it perfectly clear on the record— that the Petitioner is not offering to testify or prove that he was not actually in the State of Illinois at the times charged in the complaint and warrant involved in this proceeding, but simply because, as he did not commit any offense and therefore he is not a fugitive. Am I correct?"

to which counsel for the prisoner, Mr. Morris, replied: "Yes." The objection of counsel for the Appellee to the offer of this evidence was then renewed on the same grounds as before; that the matter offered was not a permissible subject for inquiry in this proceeding and must be tried out in

the state courts of Illinois after the Petitioner was brought there to answer. The court below sustained the objection and did not permit the prisoner, Millard, to give the testimony which was offered.

It is impossible to believe that it can be seriously contended here that the District Court was not entirely right in sustaining the objection and making this ruling. The cases in the Federal courts are unanimous on this point. They have recently been collected and cited to this court in the case of Glass, Appellant, vs. Becker, Sheriff, et al., Appellees, 25 Fed. (2d), p. 929. Some of them are Drew vs. Thaw, 235 U. S. 432; Roberts vs. Riley, 116 U. S. 80; Munsey vs. Clough, 196 U. S. 364; Appleyard vs. Mass., 203 U. S. 222; McNichols vs. Pease, 207 U. S. 100; Biddinger vs. The Commissioner of Police, 245 U. S. 128.

Even in removal proceedings from one federal district to another, it has been held that one held for removal for trial for an alleged crime from one Federal district to another, is deprived of no constitutional right by the refusal of the Commissioner to admit the evidence of his innocence. U. S. of America ex rel. Hughes vs. Gault, U. S. Marshal, 271 U. S. 142, 70 L. Ed. 875, which distinguishes the case of Tinsley vs. Treat, 205 U. S. 20, 33, 51 L. Ed. 689, 695, and points out that the statement in Harlan vs. McGourin, 218 U. S. 442, 447, 54 L. Ed. 1101, 1105, that Tinsley vs. Treat held the exclusion of evidence to be the denial of a right secured under the Federal Constitution, is inaccurate.

The motives and purposes of the prisoner in leaving the State of Illinois, after the commission of the crime, cannot be inquired into in habeas corpus proceedings (Bassing vs. Cady, 208 U. S. 386, 394; 52 L. Ed. 543); nor can the motives and purposes of the accuser, or of the state authorities of the demanding state, for bringing him back there be questioned in such a proceeding. Pettibone vs. Nichols, 203 U. S. 222, 51 L. Ed. 161.

CONCLUSION.

Having thus covered, and we believe, effectively answered, all of the contentions which were made and the questions which have been raised below and on this appeal, we respectfully, but earnestly, insist that the most casual examination of the record in this case will disclose, that this appeal is wholly frivolous and unmeritorious, and has patently been taken for the purpose of delaying the removal of the prisoner, Millard, for trial in the state in which he has committed a felonious offense.

Hence, the order of the District Court should be affirmed, and the prisoner remanded to the custody of the Sheriff-Appellee, to be delivered to the State Agent of the State of Illinois, as commanded by the Rendition Warrant of the Governor of this State.

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